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CIVIL, CRIMINAL AND REVENUE

(1921-1930)

BY

R. N. DYER

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THE
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CIVIL, CRIMINAL AND REVENUE
(1921—1930)

BY

R. N. IYER

AND

V. V. CHITALEY

VOLUME IV

M TO Z

THE MADRAS LAW JOURNAL OFFICE
MYLAPORE, MADRAS
1931

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ABBREVIATIONS EXPLAINED.

Reports.

All. or A.	Indian Law Reports, Allahabad Series.
A.L.J.	Allahabad Law Journal.
A.I.R. 1929 All. or 1929 A. ..	All India Reporter, 1929 Allahabad.
A.I.Cr.R.	All India Criminal Reporter.
Bom. or B.	Indian Law Reports, Bombay Series.
Bom.L.R.	Bombay Law Reporter.
A.I.R. 1929 Bom. or 1929 Bom. ..	All India Reporter, 1929 Bombay.
Bur.L.T.	Burma Law Times.
Bur.L.J.	Burma Law Journal.
Cal. or C.	Indian Law Reports, Calcutta Series.
C.L.J.	Calcutta Law Journal.
1929 Cr. C.	Criminal Cases.
Cr.L.J.	Criminal Law Journal.
C.W.N.	Calcutta Weekly Notes.
A.I.R. 1929 Cal. or 1929 Cal. ..	All India Reporter, 1929 Calcutta.
I.A.	Law Reports, Indian Appeals.
I.C.	Indian Cases.
Lah. or L.	Indian Law Reports, Lahore Series.
A.I.R. 1929 Lah. or 1929 Lah. ..	All India Reporter, 1929 Lahore.
Lah.L.J. or L.L.J.	Lahore Law Journal.
L.R.	Law Reporter, Allahabad.
L.R.A.Civ.	Law Reporter, Allahabad, Civil.
L.R.A.Cr.	Law Reporter, Allahabad, Criminal.
L.B.R.	Lower Burma Rulings.
M.L.W.	Madras Law Weekly.
Luck.	Indian Law Reports, Lucknow Series.
Mad. or M.	Indian Law Reports, Madras Series.
M.L.J.	Madras Law Journal.
M.L.T.	Madras Law Times.
M.W.N.	Madras Weekly Notes.
A.I.R. 1929 Mad. or 1929 Mad. ..	All India Reporter, 1929 Madras.
Mys.L.J.	Mysore Law Journal.
N.L.J.	Nagpur Law Journal.
N.L.R.	Nagpur Law Reports.
A.I.R. 1929 Nag. or 1929 Nag. ..	All India Reporter, 1929 Nagpur.
O.C.	Oudh Cases.
A.I.R. 1929 Oudh or 1929 Oudh ..	All India Reporter, 1929 Oudh.
O.L.J.	Oudh Law Journal.
O.W.N.	Oudh Weekly Notes.
P.R.	Punjab Record.
P.L.R.	Punjab Law Reporter.
P.W.R.	Punjab Weekly Reporter.
Pat.	Indian Law Reports, Patna Series.

P.H.C.C.	Patna Supplement to C. W. Notes.
A.I.R. 1929 P. or 1929 Pat. ..	All India Reporter, 1929 Patna.
A.I.R. 1929 P.C. or 1929 P.C. ..	All India Reporter, Privy Council Section.
Pat.L.J.	Patna Law Journal.
Pat.L.R.	Patna Law Reporter.
Pat.L.T.	Patna Law Times.
R. or Rang.	Indian Law Reports, Rangoon Series.
A.I.R. 1929 R. or 1929 Rang. ..	All India Reporter, 1929 Rangoon.
R.D.	Revenue Decisions.
S.L.R.	Sind Law Reporter.
A.I.R. 1929 S. or 1929 Sind ..	All India Reporter, 1929 Sind.
U.P.L.R.	United Provinces Law Reporter.
U.B.R.	Upper Burma Rulings.

Other Abbreviations.

Appl.	Applied.	Expl.	Explained.
Appr.	Approved.	Foll.	Followed.
Comm.	Commented.	F.B.	Full Bench.
Cons.	Considered.	P.C.	Privy Council.
Cr.	Criminal.	Ref.	Referred.
Dist.	Distinguished.	Rel.	Relied.
Disc.	Discussed.	Rev.	Revenue.
Diss.	Dissented from.	S.B.	Special Bench.
Doubt.	Doubted.		

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IYER AND CHITALEY'S

DECENNIAL DIGEST

CIVIL, CRIMINAL & REVENUE

1921—1930

VOLUME IV.

MADRAS ABKARI ACT (I of 1886).

—Complaint—Procedure.

For complaints under the Abkari Act or under the Opium Act (I of 1878), the ordinary Criminal Procedure Code, is not applicable, but the procedure contained in those Acts is to be strictly followed; and as complaints by private persons are not provided for by the procedure in those Acts, they must be treated as not properly instituted: A. I. R. 1923 Mad. 339 and 25 M. L. J. 577, Rel. on. *(Odgers, J.)* LAZAR FERNANDO *v.* AMIRTHAM FERNANDO. **119 I. C. 174 = 2 M. Cr. C. 168 = 52 Mad. 613 = 30 M. L. W. 112 = 1929 M.W.N. 507 = 30 Cr. L. J. 1011 = 1929 Cr. C. 78 = A. I. R. 1929 Mad. 604 = 57 M. L. J. 214.**

——*Abkari Act and Opium Act.*

There is no essential difference between the procedure under the Abkari Act and the Opium Act. *(Odgers, J.)* L. FERNANDO *v.* A. FERNANDO.

119 I. C. 174 = 52 Mad. 613 = 2 M. Cr. C. 168 = 30 M.L.W. 112 = 1929 M.W.N. 507 = 30 Cr. L. J. 1011 = 1929 Cr. C. 78 = A. I. R. 1929 Mad. 604 = 57 M. L. J. 214.

——*Offences both under Abkari Act and Penal Code.*

Where the accused has committed in addition to an offence under the Abkari Act a non-cognizable offence, under the Penal Code, the Police Officer would probably be correct in taking up the more serious offence as the principal offence, that is, the one in which he could arrest without a warrant, namely, S. 55 of the Abkari Act, and in following the provisions of that Act, so far as it can be done, rather than of the Criminal Procedure Code and, if he can follow the provisions of both by ensuring that the accused should appear before the Magistrate it is obviously his duty to do so. The same procedure would be the proper procedure for a Police Officer to adopt when he is confronted with an offender whose offences are both under S. 55 of the Abkari Act and a cognizable offence under the Indian Penal Code. *(Wallace and Madhavan Nair, JJ.)* Y. VENKANNA, *In re.* **90 I. C. 436 = 22 M. L. W. 98 = 1925 M. W. N. 396 = 26 Cr. L. J. 1556 = A. I. R. 1925 Mad. 856 = 48 M.L. J. 605.**

MADRAS ABKARI ACT (1886), S. 31—Procedure.

—Possession.

——*Meaning of.*

In the absence of any indication to the contrary in the Abkari Act, the word "possession" has its ordinary meaning. *(Wallace, J.)* JAYACHANDRA CHETTY *In re.* **100 I.C. 355 = 50 Mad. 745 = 25 M.L.W. 277 = 38 M. L. T. 116 = 1927 M.W.N. 158 = 28 Cr. L. J. 275 = A.I.R 1927 Mad. 413 = 52 M.L.J. 226.**

—Seizure or detention of liquor—By whom.

Private individual has no authority to seize or detain liquor which he believes to be liable for confiscation under the Act. Only Officers of a certain rank of the Revenue, Police and Abkari Departments are empowered to enter places where liquor is illicitly sold or stored. *(Spencer, J.)* NARAYANA, *In re.* **82 I.C. 149 = 20 M.L.W. 239 = 25 Cr.L.J. 1221 = A.I.R. 1924 Mad. 816.**

—S. 12—Lease to unlicensed person.

The Abkari Act does not make a lease for tapping to an unlicensed person illegal. 43 Mad. 141, Dist. *(Odgers, J.)* SANTHANARAMA MUDALIAR *v.* SAMI KARUPPANDAR. **61 I.C. 537 = 14 M. L. W. 226 = A.I.R. 1921 Mad. 455.**

—S. 15—Partnership.

It is not illegal for persons to enter into a partnership for the purpose of carrying on a toddy shop business, for which they hope at a future date to obtain a license. 24 Mad. 401; 26 Mad. 430; and 43 Mad. 141; Dist. *(Reilly, J.)* NARAYANA MURTI *v.* MALLAPUDI SUBRAMANYAM. **114 I. C. 655 = A. I. R. 1928 Mad. 1197.**

—S. 30—Arrest.

Though an officer armed with his own report can arrest a person under S. 31 an officer armed with a search warrant from the Collector under S. 30 is not authorized under that or any other section to arrest. *(Jackson, J.)* PUBLIC PROSECUTOR *v.* MUNUSAMI MUDALI. **A. I. R. 1930 Mad. 448.**

—S. 31—Procedure.

An offender arrested under S. 31 may be bailed to appear before either a Magistrate or an Abkari Inspector, while one arrested under S. 34 can be sent only before an Abkari Officer. If the offender is sent

MAD. ABKARI ACT (1886), S. 55.—Breach under.

under either section before an Abkari Officer, there is an enquiry under S. 40 (3) and the offender is sent under S. 50 with a report to the Magistrate for trial. But there is nothing in the Act to indicate what is the procedure to be followed when the offender is sent under S. 31 direct to a Magistrate. (*Wallace and Madhavan Nair, JJ.*) Y. VENKANNA, *In re.*

90 I. C. 436=22 M. L. W. 98=1925 M.W.N. 396=26 Cr. L. J. 1556=A. I. R. 1925 Mad. 856=48 M. L. J. 605.

—S. 55—Breach under.

A breach under S. 56 (b) is a breach distinct from those provided for in S. 55. Breaches under S. 56 are, from the fact that they do not entail liability to arrest, are of a less heinous kind than those under S. 55. Possession of an illicit quantity of arrack in breach of the license or permit or rule under the Act comes under S. 55 (a) and therefore does not come under S. 56 (b). (*Wallace, J.*) JAYACHANDRA CHETTY *In re.*

100 I.C. 355=50 Mad. 745=25 M. L. W. 277=38 M.L.T. 116=1927 M.W.N. 158=28 Cr. L. J. 275=A. I. R. 1927 Mad. 413=52 M. L. J. 226

—S. 55—Possession—Meaning of.

In S. 55 *(a)* the word 'possession' does not mean constructive possession but actual possession. It is only people who are actually in possession of contraband liquor without license that can be punished under the section. (*Krishnan, J.*) JAYARAMULU NAIDU *v.* EMPEROR.

71 I. C. 504=45 Mad. 842=16 M. L. W. 496=1922 M. W. N. 570=31 M. L. T. 310=24 Cr. L. J 152=A. I. R. 1923 Mad. 50=43 M. L. J. 553.

—S. 55—Procedure—Applicability of Cr. P. C.

The Abkari Act is not self-contained in the matter of the procedure for the investigation of offences under S. 55. In such a case the procedure to be followed is laid down in S. 5 (2) of the Criminal Procedure Code to be under that Code. (*Wallace and Madhavan Nair, JJ.*) Y. VENKANNA, *In re* **90 I. C. 436=22 M. L. W. 98=1925 M.W.N. 396=26 Cr. L. J. 1556=A. I. R. 1925 Mad. 856=48 M. L. J. 605.**

—S. 55—Sale—When complete.

A sale is complete as soon as the price is paid or agreed to be paid for ascertained goods. It is not necessary for a completed sale that there should be an actual delivery of the thing sold. Therefore, taking the money and bringing the bottle of liquor out for the purpose of handing it over, constitutes offence under S. 55 (1) of the Abkari Act. (*Devadoss, J.*). PUBLIC PROSECUTOR *v.* RAMASUBBAYYA CHETTY.

106 I.C. 716=51 Mad. 335=1 M. Cr. C. 5=29 Cr. L J. 124=27 M. L. W. 84=A. I. R. 1928 Mad. 179=54 M. L. J. 712.

—S. 55—Transporting—What amounts to.

Ordering servant to carry arrack to another place amounts to transporting. (*Jackson, J.*) QUADIAR BADSHA ROWTHER *v.* EMPEROR.

1927 M. W. N. 212=38 M. L. T. 138=A. I. R. 1927 Mad. 470.

—S. 56—Constructive offence—Punishment for.

A constructive offence under S. 56 read with S. 64 is not punishable with imprisonment under the proviso to S. 64. (*Jackson, J.*) QUADIAR BADSHA ROWTHER *v.* EMPEROR. **1927 M, W. N. 212=38 M. L. T. 138=A. I. R. 1927 Mad. 470.**

—S. 56—Scope of.

This section applies to breaches not provided for in other sections. *(Wallace, J.)* JAYACHANDRA CHETTY, *In re.* **100 I. C. 355=50 Mad. 745=25 M. L. W. 277=38 M. L. T. 116=1927 M. W. N. 158=28 Cr. L.J. 275=A. I. R. 1927 Mad. 413=52 M. L. J. 226.**

MAD. BOARD OF REV. STANDING ORDERS S. 17.—Restoration of order.

—S. 56—Partnership.

A partnership formed prior to taking license to trade in tody is not illegal where there is no evidence that business was not begun before taking license. *(Anantakrishna Ayyar, J.)* VAZHNUNI *v.* NATHAMUNI. **122 I. C. 342=A. I. R. 1930 Mad. 361.**

—S. 64—Transportation.

Persons transporting intoxicating drugs to shop not covered by license are guilty under S. 64 where their action was not *bona fide*. (*Devadoss, J.*). VENKAYYA *v.* EMPEROR. **111 I.C. 849=28 M.L.W. 511=1928 M.W.N. 788=1 M. Cr. C. 293=29 Cr. L. J. 929=A.I.R. 1928 Mad. 1130=55 M.L.J. 712.**

MADRAS ABKARI (AMENDMENT) ACT. (1 of 1915).

—Unauthorised Seizure.

Ordinance IX of 1914, Ss. 7 and 6—Seizure of rice not on payment or understanding of payment of compensation but to prevent its export to Godavari District is unauthorized under the Notification issued under S. 7 of the Ordinance. (*Oldfield and Hughes, JJ*). VAZIR BEG, *In re.* **13 M. L. W. 314=A. I. R. 1921 Mad. 569.**

MADRAS ADMINISTRATION OF ESTATES REGULATION (3 of 1802).

—Extent of repeal.

All the sections of the regulation have been repealed except S. 16, Cls. 2 to 7. *(Venkatasubba Rao and Jackson, JJ.)* M. MARUTHAVANASWAMI *v.* SUBRAMANIA THAMBIRAN. **85 I. C. 414=48 Mad. 716=21 M. L. W. 130=1925 M. W. N. 166=A. I. R. 1925 Mad. 240=47 M. L. J. 770.**

—S. 16—Several Claimants.

When more than one claimant appears and claims property the Judge has no jurisdiction to give any decision acting under the Regulation. In such a case it is the duty of the Judge to refer the parties to a regular suit. *(Venkatasubba Rao and Jackson, JJ.)* M. MARUTHAVANSWAMI *v.* SUBRAMANIA THAMBIRAN. **85 I. C. 414=48 Mad. 716=21 M. L. W. 130=1925 M. W. N. 166=A. I. R. 1925 Mad. 240=47 M. L. J. 770.**

MADRAS BOARD OF REVENUE ACT (1 of 1894) —S. 2—Power to decide.

———*Madras Estates Land Act* (1908), *Ss.* 171 *and* 172—*Powers of a member under the Acts.*

A single member of the Board of Revenue has power to decide questions under Ss. 171 and 172, Madras Estates Land Act, if the Board has declared that the questions may be disposed of by him. (*Phillips, Krishnan and Ramesam, JJ.*) ZAMINDAR OF KALLIKOTE *v.* MONGOLOPUR. **97 I. C. 921=24 M. L. W. 416=A. I. R. 1926 Mad. 1047=51 M. L. J. 500. (F. B.)**

MADRAS BOARD OF REVENUE STANDING ORDERS.—See also Madras Revenue Boards Standing orders.

—S. 17—Restoration of order—Interference by Civil Court.

The Board's revisional powers are conditional on the Board of Revenue being satisfied that the decision was passed owing to the misrepresentation, or fraud or other causes. (32 M. 300, *Dist.*). Where the Board merely directed that a grant which had been made at one stage of the Darkhast proceedings by a competent authority should be restored, it is not open to a Civil Court to enquire into the merits of the case and to pronounce that the decision of the Board was wrong (*Ayling and Odgers, JJ.*) SRINIVASA RAO

MAD. BOARD OF REV. STANDING ORDERS, O. 19. Cancellation of Patta.

v. RANGASWAMI. **76 I. C. 789=18 M. L. W. 523= A. I. R. 1924 Mad. 326.**

—O. 19 —Cancellation of patta.

Cancellation of tree patta under O. 19 (1) has effect of surrender of Government's right and pattahdar gets absolute rights to trees. *(Wallace J.)* SIVANU THEVAR *v.* OMAIYOURUBHAGAM. **31 M.L.W. 312= A.I.R. 1930 Mad 560.=58 M.L.J. 437.**

—O. 52—Unenfranchised inam lands—if inalienable.

Unenfranchised inam lands granted not for the performance of future services either public or private, but as a pure matter of favour for the maintenance of the donee and his heirs are not incapable of alienation. The prohibition of alienation mentioned in the standing order was merely intended to indicate that the Government had the right of resumption in consequence of the prohibited alienation though it would not exercise that right if the alienees agreed to enfranchisement and to pay the ordinary rent or to pay a quit rent without the option of refusal. *(Sadasiva Aiyar and Coutts-Trotter, JJ.)* T. S. VENKATARAMA AIYAR *v.* V. CHANDRASEKARA AIYAR. **62 I. C. 625= 44 Mad. 632=13 M. L. W. 383=1921 M. W. N. 204= A. I. R. 1921 Mad. 292=40 M. L. J. 344.**

MADRAS BOUNDARY-MARKS ACT (28 of 1860.) —Ss. 2 & 25—Fixing of boundaries.

——Ss. 2 and 25—Survey Officer can fix boundary between Zamindari village and Dharmasanam village if he thinks it necessary to prevent disputes.

A Survey Officer acting under Act XXVIII of 1860 has jurisdiction to fix the boundaries between a Dharmasanam village and a Zamindari village and the only pre-requisite for the exercise of jurisdiction is that the officer should be of opinion that such demarcation is necessary, for the prevention of disputes, etc. The fact that the funds for the survey of the Zemindari are furnished from the coffers of the Zemindari will not reduce the authority of an Officer, who is empowered by Government to act under the Act, to the level of a private surveyor employed by the Zamindarini. *(Sadasiva Aiyar and Spencer, JJ.)* NACHIYAPPAN *v.* ALUGAPPA CHETTY. **62 I. C. 87= 13 M. L. W. 172=A. I. R. 1921 Mad. 107.**

MADRAS CANALS AND PUBLIC FERRIES ACT (2 of 1890.) —Construction.

Madras Canals and Public Ferries Act gives the Government powers very seriously to restrict the liberty of people and these powers must be strictly construed. *(Reilly, J.).* ABDUL WAHAB SAHEB *v.* EMPEROR. **117 I.C. 728=28 M.L.W. 699= 1 Mad. Cr. C. 269=30 Cr. L.J. 827= A.I.R. 1929 Mad. 50=56 M.L.J. 277.**

—S. 8—Validity of notification.

Government Notification declaring ferry extending over both banks of a river for twelve miles—Notification mentioning five places as limits of ferry—Such notification is not *ultra vires* and Government must be presumed to declare five different ferries and not to prevent up and down navigation. *(Reilly, J).* ABDUL WAHAB SAHEB *v.* EMPEROR.

28 M.L.W 699=1 Mad. Cr. C. 269=117 I.C. 728= 30 Cr. L. J. 827=A.I.R. 1929 Mad. 50= 56 M.L.J. 277.

MADRAS CITY CIVIL COURTS ACT (7 of 1892). —S. 3—Ejectment suit.

——In City Civil Court—If Presidency Small Cause Courts Act, S. 41 is a bar.

A suit to eject a tenant is not cognizable by the Small Cause Court and therefore S. 3 of the City Civil Courts Act does not prohibit its being filed before the City Civil Court. *(Coutts-Trotter and Ramesam, JJ.)* M. DORAISWAMI *v.* K. NARAYANA. **68 I. C. 983=16 M. L. W. 137=1922 M. W. N. 462= 32 M.L.T. 288=A.I.R. 1922 Mad. 445= 43 M. L. J. 288.**

—S. 5 (2)—Powers of High Court to transfer case—Limits of.

Though under S. 24 of the Civil Procedure Code, the Chief Justice has jurisdiction to transfer matters other than suits to a subordinate Court, *e.g.*, the City Civil Court, he can only transfer them to a Court which has jurisdiction to try them. The jurisdiction to try a summary application in ejectment is one exclusively vested in the Small Cause Court and the Chief Justice has no power to transfer it to the City Civil Court. *(Coutts-Trotter, C. J.)* J. MANICKA CHETTIAR *v.* KUPPUSWAMI NAICKER. **98 I.C. 371=25 M.L.W. 115=38 M.L.T. 35= A. I. R. 1927 Mad. 321.**

MADRAS CITY MUNICIPAL ACT (4 of 1919) —'Governor-in-Council'—Meaning of.

The expression Governor-in-Council in the Act should since Government of India Act, 1919, be read as the Governor acting with ministers as provided in S. 46. *(Srinivasa Iyengar, J.)* EKAMBARA NAICKER *v.* COMMISSIONER OF MADRAS CORPORATION. **1926 M. W. N. 842=99 I. C. 18= A. I. R. 1927 Mad. 22.**

—Powers of Commissioner.

Commissioner whether invested with general powers of inquiring into disqualification of a candidate for election or whether he is to decide objections only—(*Quaere*). *(Coutts-Trotter, C. J. Jackson and Sundaram Chetty, JJ.)* O. A. O. K. LAKSHMANAN CHETTIAR *v.* J. S. KANNAPPAR. **50 Mad. 121=24 M. L. W. 773= 1926 M. W. N. 986=99 I. C. 148= A. I. R. 1927 Mad. 93=51 M. L. J. 738 (F.B.)**

—Reduction of tax.

Rule 23 for the conduct of business does not make it irregular to move a resolution for the reduction of a tax by a percentage and not by a specific figure. *(Kumaraswamy Sastry, J.) In the matter of* THANIKACHALLAM CHETTIAR. **84 I. C. 842= 20 M. L. W. 589=A. I. R. 1924 Mad. 868.**

—S. 49—Nature of Provisions.

——Rr. 2, 3 and 4—Provisions are substantive.

The provisions in Rr. 2, 3 and 4 are substantive provisions. *(Srinivasa Iyengar, J.)* EKAMBARA NAICKER *v.* COMMISSIONER OF MADRAS CORPORATION. **1926 M. W. N. 842=99 I. C. 18= A. I. R. 1927 Mad. 22.**

—S. 55—Nature of provisions—If directory or mandatory.

——It is merely directory and not mandatory S. 55 cannot be construed as prescribing as a condition for the validity and legality of an election, that it should be held only in the months of August or September. *(Srinivasa Iyengar, J.)* EKAMABRA NAIKER *v.* COMMISSIONER OF MADRAS CORPORATION. **1926 M.W.N. 842=99 I.C. 18= A.I.R 1927 Mad. 22.**

—S. 59,—Delegation of powers.

The requirement of R. 5 that the dispensing with shall be by the special order of the Governor with the ministers must be strictly carried out. It is not power that can be delegated or that can be exercised under any departmental rules by any persons other than the persons constituted as the proper authority : 42 *Mad.* 885, *Rel. on.* *(Srinivasa Iyengar, J.)*

MAD. CITY MUN. ACT, S. 59—Discretion.

T. EKAMBARA NAIKER *v.* MADRAS CORPORATION.

99 I.C. 18=1926 M.W.N. 842=A.I.R. 1927 Mad. 22.

—S. 59—Discretion.

———*Rules 5, 2, 3 and 4—Process not being repeated—Meaning of—Discretion under S. 5—Interference by Court.*

When the legislature speaks of the process not being repeated, it should be understood as indicating that the authority may, in its discretion in certain cases, direct that the entire process of nominations etc., need not be gone through again and that the election may be held taking it up at the point at which its further progress became checked. When the authority has exercised its discretion under R. 5, may be rightly or wrongly, the Court has no power to interfere nor when under R. 5 the date is altered the process contemplated by R. 1 is to be repeated. *(Srinivasa Iyengar, J.)* EKAMBARA NAICKER *v.* COMMISMISSIONER OF MADRAS CORPORATION.

99 I.C. 18=1926 M.W.N. 842=A.I.R. 1927 Mad. 22.

—S. 59—Elections—Meaning of.

———*"Elections" means completed elections.*

"Elections" within the meaning of S. 59 (2) (b) means completed elections which have resulted in the creation of a councillor, and does not cover disputes arising before such election. *(Coutts-Trotter, C.J. Jackson and Sundaram Chetty, JJ.)* O. A. O. K. LAKSHMANAN CHETTIAR, *v.* J. S. KANNAPPER.

99 I. C. 148=50 Mad. 121=24 M. L. W. 773=1926 M. W. N. 986=A. I. R. 1927 Mad. 93=51 M. L. J. 738 (F. B.)

—S. 59—Extent of Power—Rule 5.

Rule 5 should be construed as one providing for the exercise in a specific instance by the Governor-in-Council of the undoubted power vested in him and recognized by that rule, of fixing a fresh date for the election without the contingency mentioned in the rule happening. It does not contemplate only one fresh date being fixed by the Governor-in-Council and he may fix a series of fresh dates from time to time or as occasion may require. *(Srinivasa Iyengar, J.)* EKAMBARA NAICKER *v.* COMMISSIONER OF MADRAS CORPORATION. **99 I. C. 18=1926 M. W. N. 842=A. I. R. 1927 Mad. 22.**

—S. 59—Notice of date of Election—Rule 6.

The object of R. 6 is clearly to give notice to the voters and the candidates for the election to be held and that rule cannot be read as though that notice of election may be given without notifying the date of the election. The clear and indisputable object of the rule is to give notice of the date of the election and the names and other details with regard to the candidates for the election. *(Srinivasa Iyengar, J.)* EKAMBARA NAICKER *v.* COMMISSIONER OF MADRAS CORPORATION. **99 I. C. 18=1926 M. W. N. 842=A. I. R. 1927 Mad. 22.**

—S. 59—'Three days.'

The three days referred to in R. 5 are the three days indicated in R. 6. *(Srinivasa Iyengar, J.)* EKAMBARA NAICKER *v.* COMMISSIONER OF MADRAS CORPORATION. **99 I. C. 18=1926 M. W. N. 842=A. I. R. 1927 Mad. 22**

—S. 65—Offence under.

———*Giving false name and applying for slip.*

Where a person, appears before the identifying officer, and giving a false name applies for a slip to be used for applying for the ballot paper, but does not enter polling officer's room, only makes preparation to apply for ballot paper is not guilty under S. 65 (2). *(Devadoss, J.)* SYED HUSSAIN *v.* MUNIRATHNAM CHETTY. **115 I. C. 813=1929 M. W. N. 505=30 Cr. L. J. 528=12 A. I.Cr. R. 336=A. I. R. 1929 Mad. 489.**

—S. 110—Interpretation.

MAD. CITY MUN. ACT, S. 111—Pension—Meaning of.

———*"Gross income received in or from the City" of Madras—Meaning of.*

The expression "gross income received in or from the City" in the proviso to Rule 7 of Sch. IV does not include income arising out of business transacted outside Madras though the proceeds are transmitted to and received by the Madras agents of company in England. *(Spencer, Offg, C.J, and Devadass, J.)* BEST AND CO., LTD. *v.* CORPORATION OF MADRAS.

84 I. C. 107=20 M.L.W. 347=A. I. R. 1924 Mad. 754=46 M. L. J. 505

—S. 110—Life Assurance Company.

———*Taxable income—Onus of proof.*

The Taxable income of an Assurance Company is the aggregate of the Interest, dividend and rents received by it during the year.

Where the interest on the premia actually received even without deducting the assumed rate of interest therefrom is less than Rs. 25,000 *held* that the Company has discharged the *onus* that lay upon it under Rule 7, proviso of the Taxation Rules by showing that its income would not have exceeded Rs. 25,000 and the circumstance that it has not been able to state positively what its actual gross income was would not disentitle it to the benefit conferred under the said proviso. *(Ayling and Venkatasubba Rao, JJ.)* SUN LIFE A. CO. OF CANADA *v.* CORPORATION OF MADRAS. **66 I.C. 800=46 Mad. 10=1922 M.W.N. 155=15 M.L.W. 330=31 M.L.T. 271=A.I.R. 1922 Mad. 85=42 M.L.J. 283.**

—S. 110—Taxes and license fee—

———*Distinction.*

There is a great difference between taxes and license fee. That a tax is not the same as a license fee, is clear from the fact that no permission has to be obtained before the tax becomes payable and the tax is not paid for such permission, whereas the license fee is payable in respect of a permission which is granted by the Corporation. So the taxes cannot be treated as being in the same category as license fees under the Act. *(Phillips and Reilly, JJ.)* CORPORATION OF MADRAS *v.* SPENCER AND CO. **121 I.C. 849=52 Mad. 764=30 M.L.W. 372=1929 M.W.N. 431=A.I.R. 1930 Mad. 55=57 M.L.J. 71.**

—S. 111—Deduction of profession tax.

Profession tax paid under S. 111 of the Madras City Municipal Act cannot be allowed as proper deduction from the taxable income as an expenditure incurred solely for the purposes of the profession of the assessees within the meaning of S. 11 of the Income-tax Act. *(Coutts-Trotter, C. J, Krishnan and Beasley, JJ.)* COMMISSIONER OF INCOME-TAX, MADRAS *v.* KING AND PARTRIDGE. **92 I.C. 943=49 Mad. 296=1926 M.W.N. 478=24 M. L. W. 566=A. I. R. 1926 Mad. 368=50 M. L. J. 176 (F. B).**

—S. 111—Incorporated Company.

Incorporated Company having its paid up capital in sterling is taxable. *(Schwabe, C., J. Coutts-Trotter and Ramesam, JJ.)* BEST AND CO. LTD. *v.* CORPORATION OF MADRAS. **79 I. C. 928=47 Mad. 262=19 M. L. W. 142=34 M.L.T. 65=1924 M.W.N.249=A. I. R. 1924 Mad. 420=46 M. L. J. 217 (F. B.).**

—S. 111—Pension—Meaning of.

The word pension is used generally and without any qualifications and must be held to cover political pensions as well as pensions in the ordinary sense and consequently a periodical payment made by the State for the support of title conferred by it comes within the definition of "pension." *(Waller and Pandalai JJ.)* GULAM MD. ALI *v.* CORPORN, OF MADRAS. **122 I. C. 360=52 Mad. 866=30 M.L.W. 261=A.I. R. 1930 Mad. 200=57 M.L.J. 536.**

MAD. CITY MUN. ACT, S. 111.—Retirement—Liability to tax.

—S. 111—Retirement—Liability to Tax.

Any person engaged in active pursuit of a profession art, trade or calling or holding any appointment, is liable to pay profession tax if the income he enjoys therefrom brings him within any of the clauses specified in the schedule. If and when he retires he ceases to be liable. *(Waller and Pandalai, JJ.)* GULAM MD. ALI. *v.* CORPORN, OF MADRAS.

122 I. C. 360=52 Mad. 866=30 M. L. W. 261=A. I. R. 1930 Mad. 200=57 M.L.J. 536.

—S. 113—Tax when due.

Profession tax cannot be said to be due till the proper authority has assessed the same by the name of assessee being placed in the proper class. *(Waller and Pandalai, JJ.).* GULAM MD. ALI *v.* CORPORATION OF MADRAS. **122 I.C. 360=52 Mad. 866=30 M.L.W. 261=A.I.R. 1930 Mad. 200=**

—S. 113—Time of assessment. 57 M.L.J. 536.

Assessment of taxes payable by each individual is a contemporaneous operation within the period of taxation (year or half year) and the power of assessment conferred by R. 88. Taxation rules, to be properly exercised must be exercised within the half year to which the assessment relates and not retrospectively for several periods together and period of limitation for any suit for such tax begins to run from such date of assessment. *(Waller and Pandalai, JJ.)* GULAM MD. ALI *v.* CORPORATION OF MADRAS. **122 I.C. 360=52 Mad. 866=30 M.L.W. 261=A.I.R. 1930 Mad. 200=57 M.L.J. 536.**

—S. 129—Bye-laws.

———*By-law inconsistent with S.* 129 (1) *if* ultra vires.

By-laws made in pursuance of a delegated authority to that effect must be consistent with the statute under which they came to be made and since a bye-law abridges the right to refund conferred by S. 129 (1) it is inconsistent with it and is *ultra vires*: 18 *Mad.* 236 *Appr. (Reilly and Cornish, JJ.)* V. M. RAGHAVALU NAIDU & Son *v.* CORPORATION OF MADRAS. **31 M.L.W. 721=1930 M.W.N. 427=A.I.R. 1930 Mad. 648.**

—S. 129—Corporation, powers of.

———*Refund of timber tax on export—Notice prior to export—Penalty for failure—Validity of bye-law.*

Bye-law 8 provides that 48 hours notice prior to the export of timber must be given. A claim to enforce it by refusing refund is unreasonable and the Corporation has no authority to promulgate a bye-law enforceable by a penalty and so as to curtail the statutory right of the exporter to obtain a refund; the bye-law is therefore *ultra vires* on these grounds and also on the ground that it effects to impose a penalty of forfeiture without any express power to do so: *Kruse* v. *Johnson*, 2 *Q. B. D.* 91; *Queen* v. *Pawlett*, 8 *Q. B.* 491; *Queen* v. *Bird*, 2 *Q. B.* 340; *Kirk* v. *Nowill*, 1 *T. R.* 118, *Appr. (Reilly and Cornish, JJ.)* V. M. RAGHAVALU NAIDU & SON. *v.* CORPORATION OF MADRAS. **31 M. L. W. 721=1930 M. W. N. 427=A. I. R. 1930 Mad. 648.**

—S. 129—Penalty for breach—Bye-law 14.

The only penalty fixed by the bye-laws for a breach of them is that contained in bye-law 14, namely liability to pay a fine of Rs. 50 on conviction and power of forfeiture of the right to refund is not conferred by any bye-law for breach of bye-law 8. *(Reilly and Cornish, JJ.)* V. M. RAGHAVALU NAIDU AND SON. *v.* CORPORATION OF MADRAS. **31 M. L. W. 721=1930 M. W. N. 427=A. I. R. 1930 Mad. 648.**

—S. 155—Fixing of rates.

Resolution for reduction of tax postponed by President for discussion after budget discussion is in order when coupled with a resolution for reduction of expenditure though it might reduce statutory minimum balance since budget expenditure must not be deemed to be finally voted and also because there may be other modes of taxation. *(Kumaraswami Sastry, J.)* *In the matter of* O. THANIKACHALAM CHETTIAR. **84 I. C. 842=20 M. L. W. 589=A.I.R. 1924 Mad. 868.**

MAD. CITY MUN. ACT, S. 288.—Exemptions.

—S. 169—Scope of power.

———*Fixing limit of free supply of water.*

On the language of S. 169 (5) the Standing Committee has power to determine what should be the free supply of water under varying conditions, and the very fact of the word "a" in the section having been used before "maximum" shows that there was not intended to be one and only one maximum. *(Phillips, J.)* KUPPUSWAMI AIYER *v.* CORPORATION OF MADRAS. **22 M. L. W. 877=91 I.C. 7=A. I. R. 1926 Mad. 281.**

—S. 226—Scope.

———*Section does not apply to licenses for keeping ice depot.*

S. 226 deals with temporary obstructions, which would be an offence unless permission is granted for making them. It has nothing whatever to do with giving licenses for keeping an ice depot. *(Phillips, J.)* KESAVALU NAICKER *v.* CORPORATION OF MADRAS. **23 M. L. W. 233=92 I.C. 1053=A. I. R. 1926 Mad. 381=50 M. L. J. 301.**

—S. 233—Essentials for offence.

The essence of the offence under S. 233 is the act of constructing or reconstructing and not merely that of maintaining an already constructed building in existence. *(Curgenven, J.)* M. A. RAZAK *v.* KING-EMPEROR. **50 Mad. 760=25 M. L. W. 613=38 M. L. T. 336=102 I. C. 218=28 Cr. L. J. 522=8 A. I. Cr. R. 174=A. I. R. 1927 Mad. 501=52 M. L. J. 620.**

—S. 288—Erection and use.

———*License fee—Machinery dangerous to the public or a nuisance*—Onus *of proof—Appeal to Standing Committee.*

A license fee should be paid both for erection of machinery as well as for its use, under S. 288. For erection one has to pay only once while for use every year. When machinery is removed from one place to another and set up at the latter place erection fee must be paid anew. Under S. 288 license is necessary only for machines causing public nuisance or danger. The onus of proving the existence of danger or nuisance lies on the prosecution. An accused's failure to appeal to the Standing Committee against the imposition of the licence fee does not bar him from contending that his case does not fall under the liability imposed by S. 288. *(Krishnan, J.)* A. E. SMITH, *In re.* **81 I. C. 72=18 M. L. W. 879=33 M. L. T. 185=25 Cr. L. J. 584=A. I. R. 1924 Mad. 389=45 M. L. J. 731.**

—S. 288—Exemptions.

———*Licenses granted under special Acts.*

By virtue of the special Acts under which the Madras Electric Tramways Ltd. and the Madras Electric Supply Corporation Ltd, have been granted licenses by the Government, they are exempt from the operation of Ss. 288 and 289 of the City Municipal Act empowering the Municipality to issue licenses, the said sections being inconsistent with the powers granted by the Government under the Special Act: *City and Southern London Railway Company* v. *London County Council*, (1891) 2 *Q. B.* 513, *Foll. (Waller, J.)* CORPORATION OF MADRAS *v.* MADRAS ELECTRIC TRAMWAYS LTD. **101 I. C. 396=A. I. R. 1927 Mad. 522=52 M. L. J. 474.**

MAD. CITY MUN. ACT, S. 288.—Permission—When necessary.

—S. 28ε—Permission—When necessary.

——*Whether machinery is or is not nuisance is immaterial—Permission has to be obtained.*

The question whether the machinery is or is not a nuisance is one for the Commissioner alone, and if he finds that it is, a nuisance he may refuse permission altogether. Whether it is a nuisance or not is immaterial, permission has to be obtained in either case and may be withheld in the former case. (*Wallace and Madhavan Nair, JJ.*) P. NATESA MUDALIAR *In re.* **99 I. C. 324=50 Mad. 733=1927 M. W. N. 6=28 Cr. L. J. 116=38 M. L. T. 166=7 A.I Cr. R. 263=26 M. L. W. 890=A. I. R. 1927 Mad. 156=51 M. L. J. 704.**

—S. 347—Construction of Rule 5.

Rule 5 should be construed as one providing for the exercise in a specific instance by the Governor-in-Council of the undoubted power vested in him and recognized by that rule, of fixing a fresh date for the election without the contingency mentioned in the rule happening. It does not contemplate only one fresh date being fixed by the Governor-in-Council and he may fix a series of fresh dates from time to time or as occasion may require. (*Srinivasa Iyengar, J.*) T. EKAMBARA NAICKER *v.* COMMISSIONER OF MADRAS CORPORATION. **99 I. C. 18=1926 M. W. N. 842=A. I. R. 1927 Mad. 22.**

—S. 349—Scope.

The words " for carrying out all the purposes of this Act " are not controlled by the earlier words in that sub-section and include the making of refunds of timber ; the sub-section is a general and residual provision conferring by-law-making power for all the purposes of the Act which have not been specifically mentioned in the Act. (*Reilly and Cornish, JJ.*) V. M. RAGHAVALU NAIDU & SON *v.* CORPORATION OF MADRAS. **31 M.L.W. 721=1930 M.W.N. 427=A.I.R. 1930 Mad. 648.**

—S. 349—Validity of Bye-law.

Subsidiary legislation, by bye-law if it is to be valid must come clearly within the powers given to the body making it by their controlling statute and neither S. 119 (1) nor S. 349 (2) empowers the Corporation to make bye-laws in regard to the refund of taxes, (*Reilly and Cornish, JJ.*) V. M. RAGHAVALU NAIDU & SON *v.* CORPORATION OF MADRAS. **31 M.L.W. 721=1930 M.W.N. 427=A.I.R. 1930 Mad. 648.**

—S. 365—Levy of license fee.

——*Limitations on power.*

A power given to council to levy license fees cannot be used as power of taxation. The fee income must be more or less proportionate to the trouble and expense incurred by the Corporation in issuing license and in controlling trades and other matters for which licenses are issued. But roughly speaking if the fees bring in much more than the cost of necessary operations, or if the fees are so fixed that the whole cost incurred by the Corporation in connexion with all the licenses or a grossly disproportionate part of it was imposed on one particular trade or a few particular trades, then the Courts can interfere on grounds of unreasonableness. Hence where the license fees for storing spirits was raised from Rs. 25 to Rs. 200, the Courts interfered : *Kruse v. Johnson*, (1898) 2 *Q. B.* 91 and 2 *Rang.* 215 ; *Foll. Institute of Patent Agents* v. *Lockwood*, 1894 *A. C.* 347, *Ref.* (*Phillips and Reilly, JJ.*) CORPORATION OF MADRAS *v.* SPENCER & CO. **121 I. C. 849=52 Mad. 764=30 M. L. W 372=1929 M. W. N. 431=A. I. R. 1930 Mad. 55=57 M.L.J. 71.**

—Sch. 4, R. 7—Benefit under proviso.

Assessment on gross income and not on Capital—Applicability of proviso—Onus of proof.

MAD. CITY POLICE ACT (1888), S. 71—Obstruction—Intention—Relevancy of

For the application of the proviso to R. 7 it is not incumbent on the company to show that it actually did business in the city in the year prior to the taxation. The decisive test is whether the company transacted or not its business in the city. A company which has no office within the city, but begins to transact business within the city in the year of taxation through an agent and which has not in any manner transacted business or received any income from the city during the year immediately preceding the year of taxation can claim the benefit of proviso to R. 7 and the taxation should be on gross income as provided by R. 7 and not on capital of the company. (*Venkatasubba Rao and Madhavan Nair, JJ.*) VULCUN INSURANCE CO. LTD. *v.* CORPORATION OF MADRAS. **124 I. C. 511=1930 M. W. N. 29=31 M. L. W. 438=A. I. R. 1930 Mad. 626=58 M L. J. 337.**

—Sch. 4, R. 7 and S. 110—Life Assurance Company.

——*Taxable income—Applicability of proviso—Proviso—Taxable income of Life Assurance Company is aggregate of rents dividend and interest received by it.*

The taxable income of an Assurance Company is to be regarded as the aggregate of the interest, dividend and rents received by it during the year.

Where the interest on the premia actually received even without deducting the assumed rate of interest therefrom is less than Rs. 25,000 *held* that the Company has discharged the *onus* that lay upon it under Rule 7, proviso of the Taxation Rules by showing that its income would not have exceeded Rs. 25,000 and the circumstance that it has not been able to state positively what its actual gross income was would not disentitle it to the benefit conferred under the said proviso. (*Ayling and Venkatasubba Rao, JJ.*) SUN LIFE ASSURANCE COMPANY OF CANADA *v.* CORPORATION OF MADRAS. **66 I. C. 800=1922 M. W. N. 155=15 M. L. W. 330=31 M.L.T. 271=46 Mad. 10=A.I.R. 1922 Mad. 85=42 M. L. J. 283.**

—Sch. 4, Part V, R. 17—

——*Reference to High Court—Duty of.*

The High Court is not bound to answer an abstract and general question of law ; the terms of reference must show how the question of law pronounced affects the particular case on hand and the Court will answer it only so far as it bears on the particular case. 31 Mad. 408 *Ref. to* (*Ayling and Venkatasubba Rao, JJ.*) SUN L. A. CO. OF CANADA *v.* CORPORATION OF MADRAS. **66 I. C. 800=46 Mad. 10=1922 M. W. N. 155=15 M. L. W. 330=31 M. L. T. 271=A.I.R. 1922 Mad. 85=42 M. L. J. 283.**

MADRAS CITY POLICE ACT (3 of 1888).

—S. 71,—Obstructions—Intention—Relevancy of.

Cl. (XI) of S. 71 of the Madras City Police Act covers the case of obstructing thoroughfare in any manner and is not limited to obstruction caused by vehicles and animals. In the case of obstruction by vehicles and animals there is no question of intention the act and obstruction caused by the act are sufficient. In other cases intention is necessary to be proved in addition to the obstruction. (*Kumaraswami Sastri, J.*) KUPPAMMAL *v.* EMPEROR. **65 I.C. 639=23 Cr. L. J. 175=A.I.R. 1922 Mad. 349.**

—S. 71—Obstruction-Intention—relevency of.

Obstructing thoroughfare in any manner such as by keeping petty bazaar is covered by Cl. (11), S. 71. Intention which is necessary to be proved in other cases need not be proved in the case of vehicles and animals. (*Kumaraswamy Sastri, J.*) THAYARAMMAL *In re.* **65 I.C. 639=45 Mad. 26=**

MAD. CITY POLICE ACT, (1888), S. 76.—Breach by Servant—Liability of Master.

30 M.L.T. 82=23 Cr. L.J. 175=14 M.L.W. 617=1921 M.W.N. 770=A.I.R. 1922 Mad. 142=41 M.L.J. 562.

—S. 76—Breach by servant— Liability of Master.

The master is liable for breach by his servant of the conditions of a license issued to him. (*Devadoss, J.*) CUNNIAH & CO. *v.* EMPEROR. **108 I.C. 636=51 Mad. 341=29 Cr. L.J. 431=10 A. I.Cr R. 93=27 M.L.W. 87=A.I.R. 1928 Mad. 473=54 M.L.J. 315.**

—S. 76—Breach by servant—Liability of servant.

A licensee is alone responsible for breach of conditions of licensee by his servant. An agent or servant of the licensee cannot be proceeded against under S. 76. (*Abdur Rahim, O. C.J. and Spencer, J.*) VELAYUDHA MUDALI, *In re*. **62 I.C. 183=43 Mad. 438=11 M.L.W. 413=22 Cr. L.J. 487=27 M.L.T. 211=39 M.L.J. 85.**

—S. 78—Cycle—'Ride'—Meaning of.

———*A rider must not necessarily propel the cycle.*

The word "ride" does not necessarily imply that the person riding should propel the bicycle himself. It may be that the rule as worded covers the case of a single person riding a bicycle. *(Krishnan, J.)* THE CROWN PROSECUTOR *v.* DURAISWAMI **72 I.C. 358=24 Cr. L.J. 358=46 Mad. 476=17 M.L.W. 273=32 M.L.T. 152=A.I.R. 1923 Mad. 364=44 M.L.J. 201.**

MADRAS CITY TENANTS PROTECTION ACT (3 of 1922)

—S. 2—Licensee and tenant.

In the absence of evidence that a tenant who held the land as tenant for many years agreed to be a mere licensee, the mere issue of licenses under the Municipal Act would not be sufficient material to raise a presumption of a change in the nature of his possession. *(Phillips, J.)* KESAVELU NAICKER *v.* CORPORATION OF MADRAS. **92 I.C. 1053=23 M.L.W. 233=A.I.R. 1926 Mad. 381=50 M.L.J. 301.**

—S. 2—Presumption—Ejectment.

Person building pucca structure must be presumed to hope that he will not be evicted. *(Phillips, J.)* KESAVELU NAICKER *v.* CORPORATION OF MADRAS. **92 I.C. 1053=23 M.L.W. 233=A.I.R. 1926 Mad. 381=10 M.L.J. 301.**

—S. 2—Tenancy.

———*Lower Court holding that tenant must be of land only—Finding is not perverse—Civil P.C. S.* 115.

To hold that the tenancy must be exclusively of land under S. 2 (4) cannot be said to be so perverse or irregular as to attract the provisions of S. 115, Civil P.C. *(Jackson, J.)* NAGAIYA NAIDU *v.* EKAMBARA CHETTIAR. **97 I.C. 796=1926 M.W.N. 714=A. I. R. 1926 Mad. 1142.**

—S. 7—Ejectment suit.

———*Defence considered and rejected—No revision lies—Civil P. C., S.* 115.

Where in a suit for ejectment of a tenant a Court which has considered the defence of the tenant on its merits and has rejected it, cannot be said to have failed to exercise jurisdiction. *(Jackson, J.)* NAGAIYA NAIDU *v.* EKAMBARA CHETTIAR. **97 I. C. 796=1926 M. W. N. 714=A. I. R. 1926 Mad. 1142.**

—S. 9—Applicability.

This section applies to a case where the suit in ejectment has not been executed or completed by the process of ejectment. A. I. R. 1924 M. 731 overruled. *(Coutts-Trotter, C. J., Ramesam and Wallace, JJ.* SYED OOMER *v.* GOPAUL. **82 I. C. 454=47 Mad. 813=20 M. L. W. 444=35 M. L. T. 40=1924 M. W. N. 687=A. I. R. 1925 Mad. 12=47 M. L. J. 350 (F. B.).**

MAD. CIVIL COURTS ACT, (1873), S. 12.—Valuation—Principles.

S. 9 of the Madras Act III of 1922 applies to landlords who hold their land as trustees of a religious institution. A.I.R. 1923 M. 308 overruled. *(Coutts-Trotter, C. J., Ramesam and Wallace, JJ.)* C. DORAIVELU MUDALIAR *v.* NATESA GRAMANI. **82 I. C. 445=47 Mad. 761=20 M. L. W. 165=35 M. L. T. 1=A. I. R. 1925 Mad. 7=47 M. L. J. 211 (F. B.)**

S. 9 was intended to apply to cases in which the suits were pending and also where suits have resulted in decrees but not where decrees have been executed. (46 Mad. 836 Diss.) An appeal is really continuation of proceedings in the suit and is only a further stage in the same and therefore an application under S. 9 would lie during the pendency of the appeal to the appellate Court. *(Schwabe, C. J. and Wallace, J.).* KANNIAPPA CHETTIAR *v.* RAMACHANDRA IYER **79 I. C. 92=19 M. L. W. 587=1924 M. W. N. 386=34 M. L. T. 257= A. I. R. 1924 Mad. 731=46 M. L. J. 407.**

—S. 9—Legal representative.

Persons claiming to be legal representatives of tenants are entitled to have the question whether the interest of their mother had devolved on them decided by the Court to which they made their application. The general frame of the Act, including Section 10, makes it clear that Section 9 was not intended to enable tenants to apply for sale of the land to them under this section after the ejectment suit, to which they were parties, had been decreed before the Act came into force. *(Spencer and Venkatasubba Rao, JJ.)* LATIFA BI *v.* MOTTAI AMMAL. **72 I. C. 141=46 Mad. 836=17 M. L. W. 341=1923 M. W. N. 233=32 M. L. T. 290=A. I. R. 1923 Mad. 320=44 M. L. J. 271.**

—S. 9—Service.

Under S. 9 the service should be personal service. *(Devadoss and Sundaram Chetty, JJ.)* THOYAMMAL *v.* K. A. RATHNAVELU NADAR. **50 Mad. 88=24 M. L. W. 852=1926 M. W. N. 951=98 I. C. 1066=A. I. R. 1927 Mad. 113=51 M. L. J. 714.**

—S. 9—Tenant of trust land.

———*Right to apply for sale.*

Tenant of trust land cannot compel trustee to sell land on which the former has built. *(Spencer and Venkatasubba Rao, JJ.)* PARTHASARATHY *v.* DORAISWAMI. **72 I. C. 826=46 Mad. 823=1923 M. W. N. 148=A. I. R. 1923 Mad 308=44 M. L. J. 91.**

MADRAS CIVIL COURTS ACT (3 of 1873)

—S. 12—' Subject-matter.

———*Meaning of.*

The term "subject-matter" is not to be confined and applied only to what is capable of valuation in money. *(Wallace and Madhavan Nair, JJ.)* VEEREMMA *v.* BUTCHIAH. **101 I. C. 379=50 Mad. 646= 25 M. L. W. 440=A. I. R. 1927 Mad. 563=52 M. L. J. 381.**

—S. 12—' Value '

The word ' value ' in S. 12 of the Civil Courts Act means market value. *(Wallace and Madhavan Nair, JJ.)* VEEREMMA *v.* BUTCHIAH.

101 I. C. 379=50 Mad. 646= 25 M. L. W. 440=A. I. R. 1927 Mad. 563=52 M. L. J. 381.

—S. 12—Valuation—Principles.

———*Suits Valuation Act, S.* 3—*Suit for declaration—Subject-matter not capable of money valuation—Plaintiff can put his own value for jurisdiction—Subject-matter relating to things having money value—Market value of such things will be the value for jurisdiction.*

The general principles for valuation of a suit for purposes of jurisdiction, where no special method of

MAD. CIV. COURTS ACT (1873), S. 13—Appeal.

valuation has been provided by statute, are that where the subject-matter of a suit is wholly unrelated to anything which can be readily stated in definite money terms, then the plaintiff, having put some money value for the purpose of jurisdiction, must put a more or less arbitrary value, and, there being no factors in the case from which the Court can say his valuation is wrong or dishonest the court will accept that valuation, and that where the subject-matter is so related to things which have a real money value that the relief asked for will affect these then the value of the suit for the purpose of jurisdiction is to be taken as the market value of the property affected. The value of a suit for a declaration as to adoption and of title as such to properties is the market value of the properties affected. *(Wallace and Madhavan Nair JJ.)* VEERAMMA *v.* BUTCHIAH. **50 Mad. 646 = 25 M. L. W. 440 = 101 I. C. 379 = A. I. R. 1927 Mad. 563 = 52 M. L. J. 381.**

—S. 13—Appeal—Court-fees Amendment Act—Effect of.

An appeal against the decree in a suit in which the valuation of the relief claimed according to the law in force at the date of the plaint was more than Rs. 5,000 but at the time of the appeal is less than Rs. 5,000, owing to the amendment of the Court-fees Act in the meanwhile, lies to the High Court and not to the District Court. *Colonial Sugar Refining Co.* v. *Irving*, (1905) *A. C.* 369, *Foll.*; 6 *B. H. C. A. C.* 166 *Ref.*; *Canada Cement Co.* v. *East Montreal* (1922) 1 *A. C.* 249, *Not Foll.*; Mad. A. S. Nos. 32 of 1924 and 415 of 1923 and 4 Mad. 220 Overruled. *(Phillips, O. C. J., Beasley and Anantakrishna Ayyar, JJ.)* DAIVANAYAGA REDDIAR. v. RENUKAMBALAMMAL **106 I.C. 616 = 50 Mad. 857 = 39 M.L.T. 417 = 26 M.L.W. 539 = 1927 M. W. N. 863 = A.I.R. 1927 Mad. 977 = 53 M.L.J. 637, (F. B.).**

—S. 13—Claim proceedings—Basis of valuation. C. P. C. O. 21, R. 58.

Where in claim proceedings the value of the decree sought to be executed against the property declared to be the plaintiff's was over Rs. 5,000 but the value of the property itself was said to be Rs. 4,000. The valuation of the appeal was clearly the value not of the decree but of the property sought to be recovered *(Wallace and Tiruvenkata Chariyar, JJ.)* DONEPUDI SUBRAMANYAM *v.* NUNE NARASIMHAM. **119 I.C. 46 = 29 M. L. W. 349 = A. I. R. 1929 Mad. 323 = 56 M. L. J. 489.**

—S. 14—Valuation—Principles.

—The general principles for valuation of a suit for purposes of jurisdiction, where no special method of valuation has been provided by statute, are that where the subject-matter of a suit is wholly unrelated to anything which can be readily stated in definite money terms, then the plaintiff, having to put some money value for the purpose of jurisdiction, must put a more or less arbitrary value, and, there being no factors in the case from which the Court can say his valuation is wrong or dishonest the Court will accept that valuation, and that where the subject-matter is so related to things which have a real money value that the relief asked for will affect these then the value of the suit for the purpose of jurisdiction is to be taken as the market value of the property affected.

Where the plaintiff brought a suit for declaration that her deceased husband was adopted to one R. and that as such the plaintiff was entitled to certain properties.

Held: the valuation of the suit would be the market value of the properties affected. *(Wallar and Madhavan Nair, JJ.)* VEERAMMA *v.* MARUPUDI. **101 I.C. 379 = 25 M.L.W. 440 = 50 Mad. 646 = A.I.R. 1927 Mad. 563 = 52 M.L.J. 381.**

—S. 16—Interpretation.

——*"Any custom etc."—Meaning of.*

The expression "any custom having the force of law" is wide enough to include the customary law which governs such communities as Makkathayan Thiyyas and the Court is not therefore bound to apply to them the ordinary Hindu Law as such. *(Waller and Madhavan Nair, JJ.)* PATTUKKAYAL CHAKUTTI *v.* KOTHEMBRA CHANDU KUTTI. **39 M.L.T. 314 = 105 I.C. 55 = A.I.R. 1927 Mad. 877 = 53 M.L.J. 368.**

MADRAS CIVIL RULES OF PRACTICE.

—R. 28—Power of Court.

Held that Courts have jurisdiction to advance the hearing of cases without the consent of parties. *(Sundaram Chetty, J.)* PANNIRSELVAM v. VEERIAH VANDIAR. **1930 M.W.N. 514.**

MADRAS COURT FEES ACT, (AMENDMENT ACT) (5 of 1922).

—*See* COURT FEES ACT (7 OF 1870).

MADRAS COURT OF WARDS ACT (I of 1902).

—S. 49 (1)—Necessity of notice.

——*Civil P.C,O. 21, R. 63—Suit to set aside order dismissing claim.*

Suit to set aside an order dismissing claim petition under O. 21, R. 63, is in continuation of the proceedings under the claim petition and no separate notice is required to be given under S. 49 (1) of the Court of Wards Act : 35 *Cal.* 202 *(P.C.), Foll. (Phillips and Odgers, JJ.)* S. A. RAJAMIER *v.* SUBRAMANYAM CHETTIAR. **116 I. C. 827 = 52 Mad. 465 = 30 M. L. W. 36 = A. I. R. 1928 Mad. 1201.**

—S. 59—Appointment of Guardian.

——*'Property'—Meaning—Power of Dt. Court to give directions.*

'Property' in S. 59 does not include trust property of which a minor is trustee but only means the property of which the minor is owner. The Guardians and Wards Act contains no provision empowering the Guardians appointed under that Act to deal with trust properties : and therefore the District Judge will be acting without jurisdiction in giving directions for the examination of the accounts of the trust property by a Commissioner and for the checking of the collections in the trust property. *(Spencer and Venkatasubba Rao, JJ).* VARADACHARIAR *v.* RAMAKRISHNAMBA. **76 I. C. 781 = 32 M. L. T. 258 = 1923 M. W.N. 208 = 17 M. L. W. 744 = A. I. R. 1923 Mad. 497 = 44 M. L. J. 367.**

—S. 63—Object.

The object of S. 63 is to preserve the powers of the Court of Wards in regard to religious endowments in respect of which the proprietor happens to possess the character of a trustee and there is nothing to show that in other parts of the Act the word 'property' is used in this extended sense, and the words 'preservation of the property belonging to the institution,' in S. 63 are very explicit and cannot possibly refer to property belonging to the proprietor in his individual right. *(Spencer and Venkatasubba Rao, JJ.)* VARADACHARIAR *v.* RAMAKRISHNAMBA. **76 I.C. 781 = 32 M.L.T. 258 = 1923 M.W.N. 208 = 17 M.L.W. 744 = A.I.R. 1923 Mad. 497 = 44 M.L.J. 367.**

MADRAS COURT OF WARDS REGULATION (Mad. Reg. 5 of 1804)

—S. 4—Adoption by Minor—Indian Majority Act.

MAD. COURT OF WARDS REG. S. 4—Adoption by Minor.

—S. 4—Adoption by minor.

———*Indian Majority Act.—Applicability of.*

A Hindu minor under the Court of Wards, if over 18 but below 21, can validly adopt, without the consent of the Court of Wards. Such an adoption is not invalid by reason of Regulation V of 1804.

As regards questions of marriage, adoption etc., the capacity of minors being left untouched by the Indian Majority Act, S. 2, the raising of the age of Majority by S. 3 from 18 to 21 in case of minors under the Court of Wards, has no effect on those matters. (*Spencer and Ramesam, JJ.*) ARULANANDA MUTHU *v.* PONNUSWAMI. **66 I.C. 265=1922 Mad. W.N. 93=15 L.W. 237=A.I.R. 1922 Mad. 1=42 M.L.J. 129.**

MADRAS CRIMINAL RULES OF PRACTICE.

R. 161—Presentation of appeal.

———*Memo. of appearance—Vakalat if necessary.*

A vakalat need not be filed in a Criminal Appeal for a proper presentation. A memo. of appearance is sufficient. (*Wallace, J.*) MANIKONDA LINGAYYA *v.* EMPEROR. **75 I.C. 985=25 Cr.L.J. 73=1924 M.W.N. 51=33 M.L.T. 224=18 M.L.W. 960=A.I.R. 1924 Mad. 192=45 M.L.J. 683.**

—R. 238—Joinder of Charges.

———*Murder and Robbery.*

It is irregular for a Sessions Judge to try charges of robbery and murder together, the first with a jury and the second with jurors sitting as assessors. (*Devadoss and Waller, JJ.*) MUNIAN, *In re* **98 I. C. 488=27 Cr. L. J. 1368=7 A. I. Cr. R. 450=A. I. R. 1927 Mad. 243.**

MADRAS DISTRICT MUNICIPALITIES ACT (IV of 1884.)

—S. 32—Delegation of Powers.

Where the chairman authorises a person under S. 32 even to lodge a complaint, he need not be specially authorised under S. 280 to complain in respect of offence under the Act. (*Abdur Rahim and Ayling, JJ.*) KRISHNASAMI NAIDU, *In re.* **60 I. C. 1003=(1920) M. W. N. 648=22 Cr. L. J. 315=12 L. W. 427.**

—S. 45—Validity of Contract.

The formalities prescribed by S. 45 of the Madras District Municipalities Act for entering into a contract with a Municipal Council must be strictly complied with and where they are not so complied with the contract becomes unenforceable as against the Municipal Council. The English common law is less rigorous in this respect. (*Coutts Trotter, C. J.*) THE MADRAS ENGINEERING WORKS, LTD. *v.* THE MUNL. COUNCIL, TRICHINOPOLY. **97 I. C. 511=(1926) M. W. N. 533.**

—S. 47—House and Land Tax.

The house and land tax under Act 4 of 1884 is not substantially identical with the property tax under Act V of 1920. (*Srinivasa Aiyangar, J.*) M. S. M RAILWAY *v.* MUNICIPAL COUNCIL, CUDDAPPAH. **100 I. C. 280=38 M. L. T. 263=A. I. R. 1927 Mad. 363=52 M. L. J. 108**

—S. 72—Essentials.

What the section refers to, is physical destruction of the building so that it is no longer a building but merely a heap of building materials. It is not necessary that no stone should be left standing on another but in the ordinary and usual acceptation of such language, it should cease to exist as a building and not merely as a building designed for particular purposes. The mere fact that the building was rendered unfit for such use as it was intended for is not enough. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) MUNICIPAL COUNCIL, TANJORE *v.* KRISHNA PILLAI. **44 Mad. 354=13 M. L. W. 225=1921 M. W. N. 139=A. I. R. 1921 Mad. 487=40 M. L. J. 306.**

MAD. DIST. MUN. ACT, (1884) S. 214—Applicability.

—S. 113—Removal of night soil.

———*Right of council to levy fees.*

Under the provisions of the District Municipalities Act of 1884 as amended by the Act of 1897, it is the duty of the Municipal Council to remove night soil from occupiers' building or land and it is illegal for the Council to charge any fees for such transport. (*Sadasiva Aiyar and Napier, JJ.*) SOUTH INDIAN RAILWAY CO, LTD. *v.* MUNICIPAL COUNCIL, TRICHINOPOLY. **59 I.C. 697=43 Mad. 905=12 L. W. 411=1920 M. W. N. 618.**

—S. 180—Powers of Municipality.

———*Sanction subject to condition—Validity of.*

Under the District Municipalities Act of 1884 the Municipal Council cannot insist upon any person, who asks for sanction to put up a building on his own land, leaving a portion of it for the use of the public when it grants the sanction. It is *ultra vires* for the Municipal Council to impose such a condition while sanctioning the plan: 16 *Mad.* 230, *Foll.* (*Devadoss, J.*) MAHADEO IYER *v.* MUNICIPAL COUNCIL, KUMBAKONAM. **98 I. C. 654=25 M. L. W. 329=38 M. L. T. 190=A. I. R. 1927 Mad. 241.**

—S. 180—Right of Applicant.

———*Municipality not granting or refusing sanction.*

Under S. 180, Cl. (5), if within the period of six weeks the Municipal Council does not grant the license, the applicant can proceed to construct, re-construct or extend a wall or building, as the case may be, but such construction must be in accordance with the plan which accompanied his application. (*Devadoss, J.*) MAHADEO IYER *v.* MUNICIPAL COUNCIL, KUMBAKONAM. **98 I.C. 654=25 M. L. W. 329=38 M. L. T. 190=A. I. R. 1927 Mad. 241.**

—S. 207—Alteration to Latrine.

———*Principles governing direction by Council.*

The view that any alteration to latrine to be ordered by a Municipal Council by a notice under S. 207 Act IV. of 1884, should be in the interests of the owner or occupier of the building to which it is attached, is a misreading of the section. The intention is to empower the municipality to take order with latrines in the interests of the general public and in particular of the neighbouring residents. (*Curgenven, J.*) MASULIPATAM MUNICIPALITY *v.* LAKSHMAMMA. **100 I. C. 645=38 M. L. T. 334=25 M. L. W. 385=1927 M. W. N. 726=A. I. R. 1927 Mad. 1125=52 M. L. J. 335.**

—S. 207—Notice to remove Latrine.

———*Place not specified—Validity of.*

Since a municipality has a statutory power to direct demolition or closing of latrines, a notice under S. 207, Act 4, 1884 by a municipality to a person to remove a latrine and to erect it in another place, without specifying the place, to which it should be removed, is not, *ultra vires*. (*Curgenven, J.*) MASULIPATAM MUNICIPALITY *v.* LAKSHMAMMA. **100 I. C. 645=38 M. L. T. 334=25 M. L. W. 385=1927 M. W. N. 726=A. I. R. 1927 Mad. 1125=52 M. L. J. 335.**

—S. 214—Applicability.

———*Wrong heading to section—Effect of.*

Though S. 214, Act IV of 1884, is to be found under a portion of the Act, headed as "Drains," still as the section expressly deals with private latrines and privies, the presence of that heading cannot affect the application of the section to any case to which it otherwise might apply. (*Curgenven, J.*) MASULIPATAM MUNICIPALITY *v.* LAKSHMAMMA. **100 I. C. 645=38 M. L. T. 334=25 M. L. W. 385=**

MAD. DIST. MUN. ACT, (1884) S. 261—Necessity of Notice.

1927 M. W. N. 726=A. I. R. 1927 Mad. 1125=52 M. L. J. 335.

—S. 261—Necessity of notice.

Where a Municipality notified to a person that he had no right to a certain property and that he should establish his right by a suit it was held that this section did not apply and notice is not necessary. (*Phillips, J.*) MUNICIPAL COUNCIL, COCHIN *v.* BAVU DEVUSSI. 92 I. C. 13=22 M. L. W. 671=A.I.R. 1926 Mad. 235.

MADRAS DISTRICT MUNICIPALITIES ACT (5 of 1920.)

—Election Petition.

———*Civil P. C., S.* 115—*Govt. of India Act, S.* 107—*Order of District or Sub-Judge—Revision if lies.*

The High Court has no jurisdiction to interfere with orders passed by Sub-Judge or District Judge on petitions presented under the rules for the decision of disputes as to the validity of an election held under Madras District Municipalities Act, as they are not Courts as defined by C. P. C., 21 Bom. 279 Foll· (*Devadoss, J.*) M. DEIVANAYAGAM PILLAI *v* P. T. S. DIWAN MOHIDEEN ROWTHER.

70 I. C. 780=16 M. L. W. 827=1922 M. W. N. 818=A. I. R. 1923 Mad. 169=44 M. L. J. 39.

—Election—Rules—R. 4—

———*'Taking part in ballot'—Meaning of.*

Where the Chairman who is a candidate himself presides at the meeting, conducts the ballot and opening the ballot box, counts the votes and acts as Returning Officer, it is 'taking part in the ballot'. The phrase is not restricted to the mere act of voting. (*Wallace, J.*) AHMAD THAMBI *v.* BASAVA.

72 I.C. 902=16 M.L.W. 898=1922 M.W.N. 813=46 Mad. 123=A.I.R. 1923 Mad. 254=44 M.L.J. 69.

—Govt. Sanction.

Criminal P. C., S. 196—Offences under Madras Municipalities Act though punishable also under Ch. 9-A, Penal Code, do not require Government sanction. A. I. R. 1924 Mad. 487. Foll. (*Madhavan Nair and Reilly, JJ.*) NUNE PANAKALU *v.* R. SUBBA RAO.

113 I. C. 625=1928 M. W. N. 801=1 M.Cr.C. 328=52 Mad. 695=30 M. L. W. 624=11 A. I. Cr. R. 556=30 Cr. L. J. 191=A. I. R. 1928 Mad. 1158=57 M. L. J. 331.

—Municipal Account Code Art. 70—Compliance of.

———*Signature of Chairman—Whether sufficient to prove scrutiny and approval of contents.*

Held that it could not be inferred from the mere *signature* of the Chairman appearing in the lists of assessment that he had scrutinised and approved their contents as required by Art. 70. (*Madhavan Nair, J.*) VASUDEVA RAO *v.* THE MUNICIPAL COUNCIL, ANANTAPUR. (1930) M.W.N. 821.

—Notification—

———*Levy of tax under—Retrospective effect.*

Where as regards the rate of tax the resolution of the Municipality was passed on 17th March 1928, but it was notified on 5th April 1928 in the Gazette to take effect from 1st April 1928.

Held that the notification was not invalid as the new rate was levied not by the notification but by the resolution and therefore it was not retrospective in operation. (*Madhavan Nair, J.*) VASUDEVA RAO *v.* MUNICIPAL COUNCIL, ANANTAPUR. (1930) M.W.N. 821.

—S. 3—Reconstruction.

———*What constitutes.*

In cases where re-construction is partial only the re-erection to constitute "reconstruction" should be done after more than one half of the cubical contents of the building have been taken down or burnt down and it is of no consequence, whether so many walls were rebuilt and such material alterations made that it can be reasonably said that there was a reconstruction of the house. (*Curgenven, J.*) VENKATA SIVAYYA *v.* EMPEROR. 100 I. C. 375=25 M. L. W. 475=38 M. L. T. 118=28 Cr. L. J. 295=7 A. I. Cr. R.445=A. I. R. 1927 Mad. 442.

MAD. DIST. MUN. ACT, (1920) S. 49—Servant.

—S. 3—Applicability.

A valid election is necessary—The words "an ordinary election held under the previous section', are not redundant. (*Ramesam and Cornish, JJ.*) SUBRAMANIYA MUDALIYAR *v.* CHAIRMAN, MUNICIPAL COUNCIL, COIMBATORE. 106 I.C. 205=39 M.L.T. 591=1927 M.W.N. 740=A.I.R. 1928 Mad. 141=53 M.L.J. 816.

—S. 13—Expenses on schools.

Government withdrawing recognition—Expenses incurred subsequently—Auditor is entitled to surcharge the person authorising—Payment illegal under District Municipalities Act R. 60 (1). (*Odgers and Madhavan Nayar, JJ.*) MD. RAZA SAHEB *v.* SADASIVA RAO. 92 I.C. 918=49 Mad. 49=1926 M.W.N. 467=A.I.R. 1926 Mad. 297.

—S. 28—Chairman—Meaning of

The word " Chairman " in S. 28 includes " Chairman delegate " in cases where there is no Vice-Chairman. (*Wallace, J.*) AHMAD THAMBI *v.* BASAVA.

92 I. C. 902=16 M. L. W. 898=1922 M.W.N. 813=46 Mad. 123=A. I. R. 1923 Mad.254=44 M. L. J. 69.

—S. 49——Election Petition.

———*Plea of disqualification under S.* 49.

A disqualification under S. 49 can be made a ground for a petition impugning the election under Rr. 1 and 11 (c) of the rules for the decision of disputes as to the validity of an election held under the Act. (*Coutts-Trotter, C.J. Wallace and Ananthakrishna Aiyar, JJ.*) SELVARANGARAJU *v.* DORAISWAMI MUDALIAR.

119 I. C. 597=52 Mad. 732=30 M. L. W. 207=A. I. R 1929 Mad. 727=57 M. L. J. 241 (F.B.)

—S. 49—'Election' what constitutes.

The rules framed for the conduct of elections of Municipal Councillors assume that nomination of candidates is included in the election. The words : " election " includes both " Nomination," and the " Poll " : *A. I. R.* 1925 *Mad.* 1119 *(F.B), Rel. on.* (*Coutts-Trotter, C. J., Wallace and Ananthakrishna Ayyar, JJ.*) SELVARANGARAJU *v.* DORAISWAMI MUDALIAR.

119 I. C. 597=52 Mad. 732=30 M. L. W. 207=A. I. R. 1929 Mad. 727=57 M. L. J. 241 (F.B.).

—S. 49—Servant.

The word "servant" as used in S. 49 means not a subordinate but one who gives his service to his master; and the word "employer" is used in the sense of a person employing any one for his benefit or on his own account. The word "servant" cannot apply to a person who is under the authority of another, nor the word "employer" to a person who is only asked to supervise the work of another. The hereditary archaka of a Hindu temple is not a servant of the trustee of the temple within the meaning of Cl. (vi), S. 49 (2) of the Act : A. I. R. 1922 Mad. 183, and 35 Mad. 631, Expl: A. I. R. 1927 P. C. 173, Dist. (*Devadoss, J.*) MANGALA *v.* AYYATHORAI. 110 I. C. 765=29 M. L. W. 285=A. I. R. 1928 Mad. 641=55 M. L. J. 632.

MAD. DIST. MUN. ACT, (1920), S. 4[illegible]—Vice-Chairman.

—S. 49—Vice-Chairman.

The Vice-Chairman of a Municipality is not an officer of a Municipality. He need not resign his post before standing as a candidate for Councillorship. *(Wallace and Madhavan Nair, JJ.)* PALANIAPPA CHETTIAR *v.* KRISHNASWAMI CHETTIAR. **90 I.C. 368 = 22 M.L.W. 429 = 1925 M.W.N. 759 = A.I.R. 1925 Mad. 877 = 48 M.L.J. 696.**

—S. 51—Rules under R. 11 (c).

——Ignoring of disqualification.

The Municipalities are the creation of a special statute and the qualifications for the Councillorship are laid down in the statute and the several disqualifications of candidates are set out *seriatim* in S. 49. If such disqualifications are overlooked at the time of the scrutiny, the method of removing the Councillor is provided in S. 51. The plain meaning of Cl. 3, S. 51, would exclude any other remedy, as no decision of any other tribunal in any other proceeding declaring the Councillor to be disqualified would have any force when the clause says he shall be deemed to be qualified unless and until the decision of the District Court is given against him. To allow another remedy to be pursued would result in conflicting decisions. Cl. (c), R. 11, refers only to the irregularities in the nomination paper and not to the disqualification of the candidate. R. 11 concerns itself only with the irregularities or illegalities that might be committed during the conduct of the election and the phrase "non-compliance with the provisions of the Act" cannot refer to anything antecedent to the actual election itself, such as the disqualification of a candidate at the time of the election, but only to the conduct of the election during which any of the provisions of the Act or the rules thereunder may be violated; *Barraclough* v. *Brown*, (1897) A. C. 615, Appr; A.I.R. 1924 Mad. 561; A.I.R. 1925 Mad. 1119 (F.B.); A.I.R. 1923 Mad. 475; and 39 M.L.J. 319, Dist: A.I.R. 1925 Mad. 1034, Diss. from. *(Devadoss, J.)* MANGALA *v.* AYYATHORAI. **110 I.C. 765 = 29 M.L.W. 285 = A.I.R. 1928 Mad. 641 = 55 M.L.J. 632.**

—S. 52—Duty of Election Court.

——Election Rules, R. 11.

There is a distinction between the pleas to be raised under Madras District Municipalities Act, S. 52, and R. 11, Election Rules. Under the latter the revising authority has not to consider whether the mistake is on account of fraud or oversight, while in the former the election Court must consider whether the wrongful insertion or omission was obtained by the counter-petitioner's deceitful connivance. The Court cannot, therefore, refuse jurisdiction to allow evidence on the question. *(Jackson, J.)* ATHIMOOLAM SERVAI *v.* GOPALKRISHNA KONE. **105 I. C. 216 = 26 M. L. W. 323 = 1927 M. W. N. 646 = A. I. R. 1927 Mad. 921 = 54 M. L. J. 269.**

—S. 52—Municipal Officer.

——Chairman of Municipality if a Municipal Officer within S. 52 (2).

The Chairman of a Municipality is not a Municipal officer within the meaning of S. 52 (2) and cannot be proceeded against under Ss. 52 (2), 56 and 57 as these sections do not apply to him: A. I. R. 1925 Mad. 877, Foll. *(Madhavan Nair and Reilly, JJ.)* NUNE PANAKALU *v.* SUBBA RAO. **113 I.C. 625 = 30 Cr. L. J. 191 = 11 A. I. Cr. R. 556 = 52 Mad. 695 = 30 M. L. W. 624 = 1928 M. W. N. 801 = A. I. R. 1928 Mad. 1158 = 57 M. L. J. 331.**

—S. 52— Powers of Inquiry.

——Offences committed under Ss. 52 *and* 55.

Even after the electoral roll is final and completed; any questions relating to offences committed under Ss. 52 and 55 can be gone into by a Court and enquiry made regarding them. To hold otherwise would be incorrect as then there would never be any scope for the operation of those sections: A. I. R. 1927 Mad. 921, Rel. on; A. I. R. 1925 Mad. 160; A. I. R. 1925 Mad. 707; A. I. R. 1926 Mad. 947 and A. I. R. 1927 Mad. 93, Dist. *(Ramesam, J.)* NARAYANASWAMI CHETTIAR *v.* SUBBARATNAM AIYAR. **122 I. C. 33 = 30 M.L.W. 889 = A. I. R. 1929 Mad. 910 = 57 M.L.J. 551.**

MAD. DIST. MUN. ACT (1920), S. 5[illegible]—Deposit—Refund of.

—S. 52—Revision.

Order of Election Court under the Act is revisable by High Court; the Judge is not a *persona designata*: A.I.R. 1923 Mad. 254; A.I.R. 1923 Mad. 192, Foll. A.I.R. 1924 Mad. 561 (F. B.), Rel. on. *(Jackson, J.)* ATHIMOOLAM SERVAI *v.* GOPALKRISHNA KONE. **105 I.C. 216 = 26 M.L.W. 323 = 1927 M.W.N. 646 = A.I.R. 1927 Mad. 921 = 54 M.L.J. 269.**

—S. 54—Offence, what is.

It is not an offence to say of a candidate that he had failed in getting elected in his own place and came to another place expecting to be elected. *(Venkatasubba Rao, J.)* SIVAPATHA MUDALIAR *v.* ABDUL RAZAK. **81 I.C. 599 = 1924 M.W.N. 490 = 25 Cr.L.J. 951 = A.I.R. 1924 Mad. 815 = 47 M.L.J. 199.**

—S. 54—Sanction for prosecution.

——Chairman committing offences not in his official capacity.

Although the Chairman of a Municipality is a public servant, if the offences alleged against him were not committed by him in the discharge of his official duties no sanction of the Government under S. 197 (1) is necessary for prosecuting him: A.I.R. 1927 Mad. 566. Foll. *(Madhavan Nair and Reilly, JJ.)* NUNE PANAKALU *v.* SUBBA RAO. **113 I.C. 625 = 52 Mad. 695 = 30 M.L.W. 624 = 11 A.I. Cr. R. 556 = 30 Cr. L. J. 191 = 1928 M.W.N. 801 = A.I.R. 1928 Mad. 1158 = 57 M.L.J. 331.**

——Cr. P. C., S. 197.

Chairman of Municipality threatening voter with injury if he did not vote for a particular candidate.

No sanction is necessary for the prosecution of a President of the Municipal Council charged with an offence of threatening a voter with injury to his property with intent to induce such voter to vote for any candidate or to abstain from voting. *(Jackson, J.)* RAJA RAO *v.* T. RAMASWAMY. **102 I.C. 347 = 50 Mad. 754 = 38 M.L.T. 338 = 25 M.L.W. 608 = 1927 M.W.N. 423 = 28 Cr. L. J. 539 = 8 A.I. Cr. R. 170 = A.I.R. 1927 Mad. 566 = 52 M.L.J. 647.**

—S. 55—Sanction for Prosecution.

Abatement of an election offence, though forming an offence under S. 171 (*a*), Indian Penal Code, can be tried without sanction under S. 196, Criminal Procedure Code being obtained. *(Odgers and Wallace, JJ.)* SESHA AYYAR *v.* VENKATASUBBA CHETTY. **77 I. C. 730 = 19 M. L. W. 201 = 33 M. L. T. 263 = 1924 M. W. N. 268 = 25 Cr. L. J. 442 = A. I. R. 1924 Mad. 487.**

—S. 58—Sanction to Prosecute.

No sanction is necessary to prosecute a Tahsildar for an offence under S. 58 while acting as a polling officer. *(Madhavan Nair and Curgenven, JJ.)* S. S. JAGANNADHASWAMI *v.* T. MANIKYAM. **106 I. C. 222 = 27 M.L.W. 81 = 28 Cr. L.J. 1038 = 9 A.I. Cr. R. 200 = 51 Mad. 259 = A.I.R. 1928 Mad. 161 = 54 M. L. J. 570.**

—S. 59—Deposit—Refund of.

——Failure to establish complaint.

Where the complainant fails but is not ordered to pay costs or compensation the deposit should be

MAD. DIST. MUN. ACT, (1920), S. 59—Object.

returned to him. (*Venkatasubba Rao, J.*) SIVAPATHA MUDALIAR *v.* ABDUL RAZAK. **81 I. C. 599 = 1924 M. W. N. 490 = 25 Cr. L. J. 951 = A. I. R. 1924 Mad. 815 = 47 M. L. J. 199.**

—S. 59—Object.

The provisions of S. 59 are introduced into the Act, partly with the object of preventing stories of election offences being invented and worked up at leisure by disappointed candidates or their partizans. Vague complaint should therefore be at once dismissed. (*Madhavan Nair and Reilly, JJ.*) NUNE PANAKALU *v*, SUBBA RAO. **113 I. C. 625 = 52 Mad. 695 = 30 M. L. W. 624 = 11 A. I. Cr. R. 556 = 30 Cr. L.J. 191 = 1928 M.W.N. 801 = 1 M. Cr. C. 328 = A. I. R. 1928 Mad. 1158 = 57 M. L. J. 331.**

—S. 69—Execution of Void Contract.

Any contract made by a Municipal Council which does not fulfil the requirements of S. 69, is absolutely null and void and mutually unenforceable. This disability is not shaken off even if the contract had been wholly executed. (*Kumaraswami Sastri and Walsh, JJ.*) MUNICIPAL COUNCIL, TIRUVARUR *v.* P. K. KANNUSWAMI PILLAI. **1930 M. W. N. 140 = 53 Mad. 352 = 31 M. L. W. 271 = A. I. R. 1930 Mad. 600 = 58 M. L. J. 377.**

—S. 78—Property Tax.

The house and land tax under Act of 1884 is not substantially identical with the property tax under Act of 1920. (*Srinivasa Aiyangar, J.*) M. S. M. RY *v.* MUNICIPAL COUNCIL, CUDDAPAH. **100 I. C. 280 = 38 M. L. T. 263 = A. I. R. 1927 Mad. 363 = 52 M. L. J. 108**

—S. 80—Invalid notice.

———*Legality of levy.*

Where a notice purporting to be under S. 80 to levy increased tax is invalid, the levy of the tax at an enhanced rate is illegal and a suit lies to recover back the tax collected under it: A. I. R. 1926 Mad. 152 and A. I. R. 1926 Mad. 800, Foll. (*Phillips, J.*) MUNICIPAL COUNCIL, RAJAHMUNDRY *v.* TADUREE SHRI RAM NARSHIMHA RAO. **109 I. C. 92.**

—S. 80—Rate of tax.

———*Specification of.*

When the Municipal Council proposes to levy a tax it must make the people understand at what rate it is going to collect the tax as provided for by the District Municipalities Act in Sch. 4 or anything of the kind. (*Devadoss, J.*). MUNICIPALITY, RAJAHMUNDRY *v.* N. J. PRASADARAYUDU. **96 I.C. 690 = 24 M.L.W. 85 = A.I.R. 1926 Mad. 800 = 50 M.L.J. 556.**

—S. 82—Gross rent.

———*Calculation of.*

The annual value of buildings, which are in existence for only a portion of the year, cannot be arrived at by distributing the gross rent for the period during which they are in existence over the period for which they are assessed. (*Spencer, J.*) V. BRAHMAYYA *v.* GUNTUR MUNICIPAL COUNCIL. **96 I.C. 1054 = 24 M.L.W. 212 = 1926 M.W.N. 680 = A.I.R. 1926 Mad. 1007.**

—S. 83—Exemption from tax.

———*Darga.*

Even if there is a darga on some part of the land or the land is the endowment or part of endowment of a darga, that does not make the land exempt from Municipal Property Tax, under S. 83. (*Reilly, J.*). JAFFER BAIG SAHIB *v.* CHICACOLE MUNICIPALITY. **103 I.C. 832 = 1927 M.W.N. 580 = A.I.R. 1927 Mad. 927.**

—S. 87—Vacant house.

Whether an unconstructed house can be said to be vacant within the meaning of S. 87. *Quare.*

MAD. DIST. MUN. ACT (1920), S. 93—Scope of.

(*Spencer, J.*) BRAHMAYYA *v.* GUNTUR MUNICIPAL COUNCIL. **96 I.C. 1054 = 24 M.L.W. 212 = 1926 M.W.N. 680 = A.I.R. 1926 Mad. 1007.**

—S. 92—Agent, who is.

Person employed to sell goods with a guarantee of payment by purchasers of company's goods is agent of the company. (*Waller and Madhavan Nair, JJ.*) SRI VILAS FIRM *v.* TINNEVELLY MUNICIPAL COUNCIL. **106 I. C. 334 = 1927 M. W. N. 277 = 39 M. L. T. 256 = A. I. R. 1927 Mad. 1020.**

—S. 92—Place of business.

Where a person merely buys goods in another place through an agent and the contract for purchase of these goods is concluded elsewhere the place where the goods are bought is not the place where the business is transacted. (*Beasley, J.*) BOMBAY CO., LTD. *v.* MUNICIPAL COUNCIL, DINDIGUL. **108 I.C. 216 = 27 M.L.W. 243 = A. I. R. 1929 Mad. 146.**

Where profits are earned in one place, while the business is controlled from another place, it is the latter place where the profits must be held to be earned. (*Beasley, J.*) BOMBAY CO., LTD. *v.* MUNICIPAL COUNCIL, DINDIGUL. **108 I.C. 216 = 27 M. L. W. 243 = A. I. R. 1929 Mad. 146.**

—S. 92—Transacting business.

———*Meaning of.*

" Transacting business " means no more than carrying on business and mere employment of agent to do company's work does not make company liable to tax so long as company's effective management is vested elsewhere. 34 M.L.J. 145 Appl. (English Case Law discussed). (*Coutts-Trotter, C. J. and Madhavan Nair, J.*) MUNICIPAL COUNCIL, DINDIGUL *v.* BOMBAY Co., Ltd. **120 I.C. 867 = 52 Mad. 207 = 29 M.L.W. 525 = 1929 M.W.N. 225 = A.I.R. 1929 Mad. 409 = 56 M.L. J. 525.**

———*Meaning of.*

"Transacting business for profit" is carrying on trade. (*Beasley, J*). BOMBAY Co. LTD., *v.* MUNICIPAL COUNCIL, DINDIGUL. **108 I.C. 216 = 27 M.L.W. 243 = A.I.R. 1929 Mad. 146.**

—S. 93—Intention.

The intention of the provision is that in no circumstances, where a transfer of residence and occupation has taken place, shall a person have to pay the tax twice over. (*Madhavan Nair and Curgenven, JJ.*) MUNICIPAL COUNCIL, CUDDALORE *v.* KRISHNA. **105 I.C. 147 = 50 Mad. 987 = 26 M.L.W. 439 = 39 M.L.T. 487 = 1927 M.W.N. 922 = A.I.R. 1927 Mad. 968 = 54 M.L.J. 147.**

—S. 93—Liability to tax.

A firm is not liable to pay the professional tax under the Act, except at their principal place of business. (*Phillips and Madhavan Nair, JJ.*) MUNICIPAL COUNCIL, MANGALORE *v.* PARRY & CO. **98 I.C. 513 = 1926 M.W.N. 822 = A.I.R. 1926 Mad. 1187 = 52 M.L.J. 360.**

A person residing within the Municipality and drawing income from rent of houses situated outside it is liable to pay profession tax. (*Wallace and Madhavan Nair, JJ*). VEERAPPA CHETTIAR *v.* MUNICIPAL COUNCIL, PALNI. **88 I.C. 662 = 21 M.L.W. 457 = 1925 M.W.N. 210 = 48 Mad. 476 = A.I.R. 1925 Mad. 607 = 48 M.L.J. 428.**

—S. 93—Scope of.

———*Liability to tax—Nature of income.*

The first part of the sub-section deals with the class of persons to be taxed. The latter part declares under what circumstances they become liable to pay the tax, and limits it to cases in which they are in receipt of salary or pension or are making a professional income and, therefore, a temple in gaining a small addition to its income by investing its surplus funds

MAD. DIST. MUN. ACT. (1920)—S. 95—Scope of.

cannot in any sense be said to be exercising a profession or earning a professional income.

Srinivasa Aiyangar, J.—It is only when the making of the investment and the receipt of the income therefrom is followed as a profession that such income can be taxed. *(Wallace and Srinivasa Ayyangar, JJ.)* MADURA DEVASTHANAM *v.* MADURA MUNICIPALITY. **110 I.C. 89=51 Mad. 301=27 M.L.W. 834= A.I.R. 1928 Mad. 569=54 M.L.J. 625.**

Residence in S. 95 must be interpreted in the sense of personal residence and that one who neither himself personally resides nor maintains a residence for himself or his family within the municipality but merely maintains an office for the collection of his rent cannot be said to reside within the Municipality. *(Wallace and Madhavan Nair, JJ.)* VEERAPPA CHETTIAR *v.* MUNICIPAL COUNCIL, PALNI. **88 I. C. 662=21 M.L.W. 457=1925 M.W.N. 210= 48 Mad. 476=A. I. R. 1925 Mad. 607= 48 M. L. J. 428.**

—S. 98—Letting out—Motor bus.

A motor-bus plying for hire up and down the Municipality is a carriage let out for hire within the Municipality. The mere fact that it is let out to several people, or that it travels on fixed route, makes no difference whatever. *(Coutts-Trotter, C. J.)* CHINGLEPUT MUNICIPALITY *v.* AYYAKANNU. **103 I. C. 883=26 M. L. W. 81=39 M.L.T. 289= 1927 M. W. N. 868=A.I.R. 1927 Mad. 798= 53 M. L. J. 374.**

—S. 180—Encroachment.

——Limitation for prosecution.

Section 362 does not govern encroachment on street. Three months' rule of limitation applies to prosecution both under Sections 362 and 180. *(Krishnan, J.)* JAGANNATHAM NAIDU *v.* RAMA RAO. **85 I. C. 646=26 Cr. L. J. 550=20 M. L. W. 834= A. I. R. 1925 Mad. 186=47 M. L. J. 917.**

——Liability of owner or occupier.

The only object of S. 182 (1) in saying that the chairman may require the owner or the occupier to remove encroachment is to enlarge the class of persons against whom notice may be sent and not to restrict it. Either the owner may be proceeded against or the occupier or both. There is nothing in the use of the word " or " in that section which restricts the municipality to choosing one out of the two persons proceeded against. *(Pandalai, J.)* PUBLIC PROSECUTOR *v.* PANDARAM. **31 M. L. W. 754= A. I. R. 1930 Mad. 510=58 M. L. J. 622.**

——Title perfected before the Act, effect of.

No distinction is drawn between projections which became lawful before the commencement of the Act and projections which became lawful after its commencement, and, therefore, a Municipal Council is empowered to remove an encroachment the title to which became perfected before the commencement of the Act. *(Phillips and Odgers, JJ.)* RANGAYYA *v.* RAJAHMUNDRY MUNICIPALITY. **109 I. C. 578= 51 Mad. 318=1928 M. W. N. 231= 27 M. L. W. 417=A.I.R. 1928 Mad. 477= 54 M.L. J. 581.**

——Title acquired by prescription—Removal of—Object of section.

The object of the section is not to empower the Municipality to compulsorily acquire a private property, but its scope is limited to authorising the Municipal body, in the public interest, to cause obstructions and encroachments to be removed. If any person has acquired a prescriptive title to an encroachment, still he must observe any order for its removal though he can claim compensation. *(Venkata-*

MAD. DIST. MUN. ACT. (1920)—S. 249—Interpretation.

subba Rao, J.) PUBLIC PROSECUTOR *v.* VARADARAJULU NAIDU. **81 I.C. 894=47 Mad. 716= 20 M.L.W. 573=1924 M.W.N.880=25 Cr. L.J. 1070= A.I.R. 1925 Mad. 64=47 M.L.J. 470.**

—S. 195—Structures—Erection of.

——Necessity for permission.

When a person wants to put up roof, verandah or pandal or wall of a building of grass, leaves or mats or other inflammable materials he has to obtain the permission of the Chairman, and if he does not obtain the permission of the Chairman, he is liable to penalty under S. 313. But after he has once obtained permission to put up a structure of the kind mentioned in S. 195, he is not bound to obtain a license from year to year : S. 321, Cl. 7, does not apply. *(Devadoss, J.)* CONJEEVARAM MUNICIPALITY *v.* NAGESWARA. **109 I. C. 361=51 Mad. 870=1 M. Cr. C. 209= 29 Cr. L. J. 537=28 M.L.W. 144= 1928 M. W. N. 291=A. I. R. 1928 Mad. 846= 54 M. L. J. 642.**

—S. 219—Validity of removal order.

Where a chairman ordered a tree to be removed as dangerous, on some evidence the Court cannot question the correctness of his opinion. *(Jackson, J.)* CHAIRMAN, MUNICIPAL COUNCIL, CHICAKOLE *v.* SEETHARAMAYYA. **90 I. C. 152=21 M. L. W. 280= 26 Cr. L.J. 1496=A. I. R. 1925 Mad. 584.**

—S. 249—Injunction against prosecution.

The Municipal Council should not be restrained by an injunction from launching a prosecution against the owners of rice mills if they use their premises without the Chairman's license and except in accordance with the conditions it specifies : A.I.R. 1924 Cal. 334, Ref. *(Mackay, J.)* K. S. RAMA AYYAR *v.* MUNICIPAL COUNCIL, MADURA. **119 I.C. 465= 1929 M.W.N. 172=A.I.R. 1929 Mad. 345.**

—S. 249—Interpretation.

Municipalities are statutory bodies and they are created by a statute for the benefit of the public ; and it is not proper that any provision of law relating to them should be so construed as to work hardship or injustice. The provisions of Municipal law prescribing periods of limitation under it, should not be understood as if they were articles of the Limitation Act. *(Devadoss, J.)* MUNICIPAL COUNCIL, CHIDAMBARAM *v.* SUBRAMANIA IYER. **112 I. C. 210=28 M. L. W. 501= 1928 M. W. N. 784=1 M. Cr. C. 315= 29 Cr. L. J. 994=11 A. I. Cr. R. 263= A. I. R. 1928 Mad. 1157=55 M. L. J. 495.**

——Machinery.

The machinery contemplated in the Act is machinery worked by power such as steam, water, or electrical power, and should be confined to such forms of machinery as may reasonably be held to be in the same category as combustibles and unwholesome or dangerous trades, but machinery worked by hand such as handlooms or sewing machines is excluded. *(Jackson, J.)* KRISHNAN *v.* MUNICIPAL PROSECUTOR, CANNANORE MUNICIPALITY. **92 I. C. 873= 23 M.L.W. 413=27 Cr. L. J. 361= 1926 M.W.N. 463= A. I. R. 1926 Mad. 430.**

——'Dangerous to human life, health or property.'

The words "likely to be dangerous to human life, health or property " are to be taken as qualifying each one of the previous clauses in (*q*) and not merely the last. The object seems to be to bring under municipal control by the method of issuing licenses the keeping or using of things which are dangerous to human life, health or property. Ordinarily any large machinery is dangerous to human life, but one cannot presume it with reference to any particular machinery. The conversion of paddy into rice is an industrial

MAD. DIST. MUN. ACT, (1920)—S. 24[illegible]—Interpretation.

purpose. (*Krishnan, J.*) RAMACHANDRA RAO, *In re.*
75 I. C. 691=18 M.L.W. 618=33 M. L. T. 234=1923 M. W. N. 767=25 Cr. L. J. 3=A. I. R. 1924 Mad. 375=45 M. L. J. 555.

———*'Selling grain wholesale'.*

Sale in large quantities or selling wholesale means selling to retailers or jobbers. (*Oldfield and Krishnan, JJ.*) SESHA PRABHU *v.* EMPEROR.
66 I. C. 429=1922 M. W. N. 79=31 M. L. T. 314=A. I. R. 1921 Mad. 713=42 M. L. J. 149.

—S. 24[illegible]—License if necessary.

———*' Place ' meaning of—Permission to construct obtained.*

The word " place " in S. 249 must be taken to include not only a factory, workshop, or work-place as mentioned in S. 250, Cl. 1 (a), but any other place used for the purposes mentioned in Sch. 5.

The places referred to in S. 250 are those of a more important character, and before any person can construct or establish any such factory, he is bound to get the permission of the council to do so. That permission is given solely for the construction, establishment or installation. S. 250 does not deal with user of such places but only with their inception. When the owner wishes to use them, and they are such as come within Sch. 5, Cl. (q), S. 249 becomes applicable and the owner must take out an annual license from the Chairman of the council : A. I. R. 1926 *Mad.* 1131 Appr. 50 M. L. J. 384, A. I. R 1926 Mad. 576=94 I. C. 411 : Overruled. (*Phillips, Wallace and Jackson, JJ.*) MUTHU BALU CHETTIAR *v.* MADURA MUNICIPALITY. **105 I. C. 686=39 M. L. T. 548=1927 M. W. N. 835=28 Cr. L.J. 974=27 M.L.W 239=9 A. I. Cr. R. 127=A.I.R. 1927 Mad. 961=53 M. L. J. 633=**

—S. 24[illegible]—Licensing power.

———*S. 193—Madras Local Boards Act—Effect of.*

Sect. 249 of the District Municipalities Act cannot be held as repealed by reason of the fact that Local Boards have similar power of licensing under S. 193 of the later Madras Local Boards Act (14 of 1920). (*Jackson, J*). PUBLIC PROSECUTOR *v.* RANGANAYAKULU CHETTIAR. **101 I. C. 667=50 Mad. 845=25 M. L. W. 768=28 Cr. L. J. 491=38 M.L.T. 373=8 A.I.Cr.R. 140=A.I.R. 1927 Mad. 602=52 M. L. J. 653.**

———*Permission to construct obtained—License if necessary.*

The object and scope of Ss. 249 and 250 are entirely different. The former contemplates an annual payment for the use of the machinery, while the latter, a payment once for all for installing it, and therefore permission under S. 250 does not absolve the owner of a rice-mill and engine from taking out licenses under S. 249 : A.I.R. 1926 Mad. 576, Diss. from. A. I. R. 1924 Mad. 389. Appr. (*Odgers, and Madhavan Nair, JJ*). MUTHU BALU CHETTI, *In re.* **98 I. C. 388=50 Mad. 467=26 M. L. W. 893=1927 M.W. N. 831=27 Cr. L. J. 1316=A.I.R. 1926 Mad. 1131=51 M. L. J. 490.**

The Act clearly intends to draw a distinction between what it describes as " industries " and " factories," and S. 249 applies only to industries. It would be completely anomalous to hold that, after the Council had granted permission for the erection of a mechanical power factory, it is open to the Chairman to refuse a license for its being worked or to impose impracticable conditions on its working. (*Devadoss and Waller, JJ.*) MADURA MUNICIPALITY *v.* MUTHU BALU CHETTY. **94 I.C. 411=27 Cr. L. J. 635=1926 M. W. N. 651=A. I. R. 1926 Mad. 576=50 M.L.J. 384.**

MAD. DIST. MUN. ACT, (1920)—S. 303—Election Rules.

—S. 24[illegible]—License—Rice.

" Rice," *i. e.*, paddy without husk and "broken rice " does not come within the meaning of the term " grain " in Cl. (c) of S. 5 of the Act, and so it is not necessary to take out licenses for godowns in which rice and broken rice etc., are stored for the wholesale trade. (*Spencer and Madhavan Nair, JJ.*) MUNICIPAL COUNCIL, TUTICORIN *v.* SHUNMUGA MOOPANAR. **92 I. C. 610=49 Mad. 219=23 M. L. W. 31=1925 M. W. N. 880=A. I. R. 1926 Mad. 251=51 M. L. J. 62,**

—S. 25[illegible]—Grant of License.

S. 249 applies to industries only. After permission to erect factory under S. 250 is granted license for its being worked cannot be refused. (*Devadoss and Waller, JJ.*) MADURA MUNICIPALITY *v.* MUTHU BALU CHETTY. **94 I. C. 411=27 Cr. L. J. 635=1926 M. W. N. 651=A.I.R. 1926 Mad. 576=50 M. L. J. 384.**

—S. 25[illegible]—Scope of.

S. 250 only applies where a person intends for the first time to construct or establish any factory, workshop or work place in which it is proposed to employ steam-power, water-power or other mechanical power or electric power. But, it does not apply to a case where the machinery has not been interfered with and only the shed in which the machinery was kept has been altered by changing the original room into a new room of brick and mortar. (*Krishnan, J.*) SATYANARAYANA *v.* EMPEROR. **72 I. C. 613=24 Cr. L. J. 453=17 M. L. W. 249=A. I. R. 1923 Mad. 375.**

—S. 30[illegible]—Election.

The Election Court can reject votes but it cannot also add votes. (*Jackson, J.*) RAMAKRISTNA REDDI *v.* NOONEY PANAKALU. **110 I. C. 342=A. I. R. 1928 Mad. 1129.**

———*Rule* 12—*Municipal Election Rules.*

Under R. 12 the Judge has a discretion either to order a fresh election or to declare some other party to the petition duly elected. The latter course is appropriate only when the inquiry has been confined to mere technical questions about the admissibility of certain votes. But when there are charges and counter-charges of corruption, it would be unwise to declare some other party elected and a fresh election hould be ordered. (*Jackson, J.*) RAMAKRISTNA. REDDI *v.* NOONEY PANAKALU. **110 I. C. 342=A. I. R. 1928 Mad. 1129.**

—S. 30[illegible]—Election Rules—Election Petition.

———*Amendment of Charge.*

The tribunal should be guided wherever possible in its procedure by the provisions of the Civil P. C., and it is obvious that it would be a great hampering to the course of justice, if in a proper case with proper safeguards, the learned Judge were not allowed to entertain an amendment in accordance with the evidence. (*Coutts-Trotter, C. J., Phillips and Kumaraswamy Sastri, JJ.*) APPASWAMI *v.* ETHIRAJULU. **91 I. C. 450=A. I. R. 1926 Mad. 1043.**

———*Vague Objections.*

Where only vague objections are raised to an election petition without giving any particulars the objections cannot be gone into. (*Coutts-Trotter, C. J. Phillips and Kumaraswami Sastri, JJ.*) APPASWAMI *v.* ETHIRAJULU. **91 I. C. 450=A. I. R. 1926 Mad. 1043.**

—S. 30[illegible]—Election Rules—Signature on Nomination Paper.

Object and scope of the rules require that the signature on the nomination paper should be put in by the very party concerned and not by his proxy.

MAD. DIST. MUN. ACT, (1920) S. 303—Election Rules.

(Odgers, J.) DORASWAMI NADAR *v.* JOSEPH L. MOTHER. **92 I. C. 119=1926 M. W. N. 572=24 M. L. W. 208=A. I. R. 1926 Mad. 319.**

—S. 303—Election Rules—Recount.

Where a miscount is alleged by the petitioner and his application is supported by a verified petition, and the Court is satisfied that there is a reasonable ground for the petitioner's belief that there has been a miscount, the Court has jurisdiction to grant a recount : The Stepney Case, 4 O' M. & H. 34 and (1927) M. W. N. 842 (F. B.), Ref. *(Curgenven, J.)* LAKSHUMANAYYA *v.* RAJAM AYYAR. **30 M. L. W. 949=A. I. R. 1930 Mad. 195=58 M. L. J. 118.**

—S. 303—Election Rules—R. 1—Scope.

The scope of R. 1 must be limited to cases where a poll has been held. *(Jackson, J.)* N. SRINIVASACHARIAR *v.* VENKATARAMA AIYAR. **85 I. C. 218=A. I. R. 1925 Mad. 376=47 M. L. J. 762.**

—S. 303—Election Rules, R. 4—Scope.

Rule 4 also covers cases where originally there are only two candidates. *(Jackson, J.)* R. S. NAIDU *v.* RAMIER. **97 I. C. 450=1926 M. W. N. 561=24 M. L. W. 863=A. I. R. 1926 Mad. 947=51 M. L. J. 701.**

—S. 303—Election Rules, R. 6.—Election List.

———*Adjudication by chairman—Waiver of objection.*

Where the chairman of a Revising Board has a personal interest and bias in the result of a person's name being included in the electoral roll, the chairman is disqualified from adjudicating upon the claim of that person; but that person, aware of the objection of interest, cannot take the chance of a decision in his favour and afterwards raise the objection. *Wakefield v. West Riding Ry. Co.*, 6 B. & S. 794, Rel. on.; *Frome United Breweries Co. v. Bath Justices* (1926) A. C. 586 and *Rex v. Howard*, (1902) 2 K. B. 363, Ref. *(Venkatasubba Rao and Madhavan Nair, JJ.)* MUNICIPAL COUNCIL, SRIRANGAM *v.* ANANTHA SUBRAMANIA AYYAR. **30 M. L. W. 851=A. I. R. 1930 Mad. 258.**

———*Decision of revising board—Difference in opinion—Procedure.*

A final decision ought not to be pronounced in a case in which the members of the Revising Board differ until by conference and discussion of the points in difference they have endeavoured to arrive at a unanimous judgment: 6 All. 468, Rel. on. *(Venkatasubba Rao and Madhavan Nair, JJ.)* MUNICIPAL COUNCIL, SRIRANGAM *v.* ANANTHA SUBRAMANIA AYYAR. **30 M.L.W. 851=A.I.R. 1930 Mad. 258.**

———*Objections overruled —Publication.*

A schedule of valid nominations was prepared by the Commissioner before the date originally fixed for election. Objections were taken to this list, but they were not upheld and consequently the list of valid nominations remained the same as originally framed. This list was published as prescribed by the rules and was available for the election which was ordered to be held on a subsequent date. It was held that the provisions of R. 6 were satisfied. *(Phillips, Ramesam and Wallace, J.J.)* COMMISSIONER, MADRAS CORPORATION *v.* EKAMBARA NAICKER.

106 I.C. 144=39 M. L. T. 367=26 M. L. W. 569=A.I.R 1927 Mad. 980=53 M.L.J. 603.

———*Election petition—Duty of Court.*

Court dealing with election petition must confine itself to the matters raised in the petition. *(Jackson, J.)* R. S. NAIDU *v.* RAMIER. **97 I. C. 450=1926 M.W.N. 561=24 M.L.W. 863=A.I.R. 1926 Mad. 947=51 M.L.J. 701.**

MAD. DIST. MUN. ACT, (1920) S. 303—Election Rules.

—S. 303—Election Rules, R. 6, Injunction.

Court can't grant an injunction restraining the candidate declared elected from taking his seat. *(Jackson, J.)* VENKATASUBBIAH CHETTIAR *v.* SESHA AIYAR. **80 I.C. 664=20 M.L.W. 148=1924 M.W.N. 538=47 Mad. 700=A.I.R, 1924 Mad. 797=47 M.L.J. 201.**

—S. 303—Election Rules, R. 6—Revising Board.

———*Waiting Board—Collector's power to fill up vacancy in revising board.*

Where a member nominated to the Revising Board declined to serve and the Collector nominated another person not of the Waiting Board in his place, it was held that the nomination was valid. *(Venkatasubba Rao and Madhavan Nair, JJ.)* MUNICIPAL COUNCIL, SRIRANGAM *v.* ANANTHA SUBRAMANIA AYYAR. **30 M.L.W. 851=A.I.R. 1930 Mad. 258.**

—S. 303—Election Rules, R. 7 (1)—Validity of election.

———*Power of District or Sub-Judge.*

Any dispute as to the validity of election is beyond the jurisdiction of the Dt. or Subordinate Judge. *(Jackson, J.)* N. SRINIVASACHARIAR *v.* B. S. VENKATARAMA AIYAR. **85 I.C. 218=A.I.R. 1925 Mad. 376=47 M.L.J. 762.**

—S. 303—Election Rules, R. 8 (e)—Admission of name.

Revising authority's decision about admitting the name in the Register cannot be questioned in election proceedings. *(Wallace and Jackson, JJ.)* R. V. PALANISAMI PILLAI *v.* R. SRINIVASARANGACHARIAR. **85 I.C. 322=20 M.L.W. 851=1925 M.W.N. 283=A.I.R. 1925 Mad. 160=47 M.L.J. 795.**

—S. 303, —Election Rules, R. 9.

———*Agent of candidate not allowed at polling—Validity of election.*

Not allowing the candidate's agent to be present before the polling officer at the time when the ignorant or illiterate voters asked the assistance of the polling officer for the purpose of marking a ballot paper does not vitiate the election. *(Devadoss, J.)* MOIDEEN PILLAI *v.* UMAR UDUMAN THARAGANAR.

113 I.C.=548=A.I.R. 1929 Mad. 391.

—S. 303—Election Rules, R. 11.

———*Election petition—Validity of objection.*

Unless the objections raised in the election petitions can be brought under one or other of the 3 sub-clauses of Rule 11 the election petitions should be rejected *in limine.*

Where the only point taken in the petitions to contest a municipal election was that the candidates who had been declared elected had been wrongly put upon the electoral roll because they had not paid their taxes and that one of them was not a resident within the Municipality. It was held that the objection to the election was not a valid one. *(Krishnan, J.)* JANARDHANAN *v.* M. N. VERGHESS. **87 I. C. 113=1925 M. W. N. 305=A. I. R. 1925 Mad. 707=48 M. L. J. 451.**

—S. 303—Election Rules, Rr. 11 and 32—Revision —C. P. C. Sect. 115.

Where the lower Court merely on the evidence as to whether a certain rule had been broken held that Rule 32 had been broken and that the election was invalidated, and where there was no evidence before the Court on which it could come to a finding that the result of the election had been materially affected : it was held that its finding that the result was affected was based on no evidence and contrary to R. 11, that it exercised its jurisdiction with material irregularity,

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and that the High Court could interfere in revision. (*Wallace and Madhavan Nair, JJ.*) PALANIAPPA CHETTIAR *v.* KRISHNASWAMI CHETTIAR.

90 I. C. 368=22 M.L.W. 429=1925 M.W.N. 759= A. I. R. 1925 Mad. 877=48 M. L. J. 696.

—S.303-Election Rules,R. 11-Setting aside election.

———*Revision—C. P.C., S.* 115.

The important aspect of the matter under R. 11 (c) is that the result of the election should have been materially affected by an irregularity rather than that there was a mere non-compliance with the provisions of the Act or the rules. Before setting aside an election, therefore, the Court must come to a finding on the question whether the result of the election would have been different had the irregularity not occurred. Failure of the Court to come tot his finding is material irregularity and therefore revisable. A. I. R. 1925 Mad. 877 and A.I.R. 1927 Mad. 546 Foll. (*Curgenven, J.*) UMAR UDUMAN THARAGANAR *v.* MOIDEEN PILLAI. **119 I.C. 145=1927 M. W. N. 838= A. I. R. 1929 Mad. 257.**

—S. 303—Election Rules, Rr. 11 & 32.

———*Breach of rules—Validity of election.*

A breach of the election rules will not in itself justify an Election Court holding that the e lection is invalid and must be set aside. It has to be further proved that the breach of the rules materially affected the result of the election. (*Wallace and Madhavan Nair, JJ.*) PALANIAPPA CHETTIAR *v.* KRISHNASWAMI CHETTIAR. **90 I. C. 368=22 M. L. W. 429= 1925 M. W. N. 759=A. I. R. 1925 Mad. 877= 48 M. L. J. 696.**

—S. 303—Election Rules, R. 12,

———*Ballot paper—Validity of—Finality of judges order—Voting by ballot—Ballot paper whether valid, is purely question of fact—Judge's order is final.*

Where the question was whether a ballot paper which contained a cross in Col. 2 instead of in three, of the voting paper, was valid. It was held that it was purely a question of fact and according to R. 12 of the Rules for decision of disputes, the Judge's order on it is final. (1927) M. W. N. 842, Ref. (*Jackson, J*). MALLIKHARJUNA RAO *v.* VENKATARAO NAIDU. **121 I. C. 32=A. I. R. 1929 Mad. 793.**

———*Fresh election or election of candidate next in rank.*

Where a candidate, who stands next in rank and who challenges an election, claims the seat and the disqualification under which the successful candidate is ultimately found to labour was not known to all or any of the voters who cast their votes for him, a second election must be ordered and the candidate who stood next in rank cannot be declared elected. Hobbs *v.* Morey, (1904) 1 K. B. 74 Foll. (*Coutts-Trotter, C.J. Phillips and Kumaraswami Sastri.JJ.*) GOPALA AYYANGAR *v.* MAHOMED IBRAHIM ROWTHER **90 I. C. 759=1925 M. W. N. 824=48 Mad. 509= 22 M. L. W. 320=1925 M. W N. 783= A. I. R. 1925 Mad. 1119=49 M. L. J. 606.**

—S. 303—Election Rules, Rr. 14, 15 and 27.

———*Interpretation.*

Where the District Judge arrived at the finding that the result of the election had been materially affected by the improper rejection of some ballot-papers which, if accepted, would have left each of the contesting candidates with equal votes upon interpreting Rr. 14, 15 and 27, it was held that the District Judge was within his jurisdiction to interpret the rules as he did and his so doing was neither illegal nor materially irregular. (*Reilly, J.*) KOPPULA SUBBIAH *v.* THAMMANA MANIKYAM. **106 I. C. 398= 39 M.L.T. 654=A.I.R. 1928 Mad. 199.**

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—S. 303—Election Rules, Rr. 14 (1) and 17 (1).

———*Initials.*

The placing by the polling officer of his initials on the face of the ballot papers does not *per se* contravene R. 14 (1) and does not by itself invalidate the votes. The serial number printed on the ballot paper is not a mark by which the voter may be identified within the meaning of R. 17 (1); nor does the fact that the serial number appearing in the counterfoil of the ballot papers was printed not only on the back of the ballot paper itself but also on its face. The placing of such initials does not in any way facilitate the identification of particular voter and consequently, the provisions of R. 17 (1) are not thereby infringed. (*Phillips and Odgers, JJ.*) VISVANATHA PILLAI *v.* PERIASWAMY PILLAI. **80 I.C. 573=34 M.L.T. 207= 19 M.L.W. 636=1924 M.W.N. 631= A.I.R. 1924 Mad. 766=46 M.L.J. 491.**

—S. 303—Election Rules, R. 14 (1)—Vote.

———*Municipal Election Rules Madras—Absence of polling officer's initials—Vote if invalid.*

A vote is not invalid and should not be rejected on the sole ground that it does not bear the polling officer's initials even though it is proved that in all other respects it is a properly recorded vote by a duly qualified voter. Rule 14, Cl. (1) is not a mandatory rule the infringement of which will render the vote necessarily invalid. The rule is evidently intended to identify the ballot paper as one given out by the polling officer. If the paper can be so identified by other evidence the absence of the initials may be disregarded. (*Krishnan, J.*) KANNIAPPA MUDALIAR *v.* B. CHINNASWAMI CHETTIAR. **73 I. C. 540= 18 M. L. W. 160=33 M. L. T. 37= 1923 M. W. N. 447=A. I. R. 1924 Mad. 38= 45 M. L. J. 329.**

—S. 303—Election Rules, R. 15—Revision.

———*Polling Officers marking papers secretly without allowing candidates to see marks—C. P. C. S.*, 115.

Where a Court held that the marking of the ballot papers by the polling officers secretly and without allowing the candidates or their agents to see how the marks were made was in contravention of R. 15 of the Rules for the conduct of elections it did not act with material irregularity in the exercise of its jurisdiction, nor assumed jurisdiction which it did not possess, and so its order was not revisable : C. R. P. No. 541 of 1923, Foll. A. I. R. 1927 Mad. 1000, not foll. A.I.R. 1924 Mad. 561 (F.B.). Rel. on. (*Curgenven, J.*) UMAR UDUMAN THARAGANAR *v.* MOIDEEN PILLAI SAHIB. **119 I. C. 145=1927 M. W. N. 838= A. I. R. 1929 Mad. 257.**

—S. 303—Election Rules, R. 15—Violation of.

There is no provision in the rules insisting on the absence of the candidates or their agents from the place where the ballot paper is marked by the polling officer in the case of an illiterate voter and therefore the marking in their presence cannot be said to be a violation of any of the rules. (*Phillips, J.*) CHANDRAYUDU *v.* PEDDA RANGAPPA. **106 I.C. 129= 76 M.L.W. 533=39 M.L.T. 456= A.I.R. 1927 Mad. 1000=53 M.L.J. 655.**

—S. 303—Election Rules, R. 17 (1)—

———*Serial number and voter's number on back of ballot paper—Validity of election.*

Putting not only the serial number on the back of ballot paper but also the voter's own number on the electoral roll, renders election invalid; the effect of the election being declared void is that a fresh election should be held and not that the retiring councillor

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should be deemed to have been re-elected. Rule 17 (1) of the Election Rules does not require that the identification shall be made but merely that there is a possibility of such identification by reason of the mark. S. 9 (1) of Madras Act V of 1920 is not meant to apply to cases where an election has been held and is subsequently declared void. *(Phillips and Odgers, JJ.)* SETHURAMA MUDALIAR *v.* MANGALA GOUNDAR.

80 I.C. 401=34 .M.L.T. 204=19 M.L.W. 632= A.I.R. 1924 Mad. 764=46 M. L. J. 494.

—S. 303—Election Rules.

———*Inspection of Ballot Papers.*

The power of ordering inspection of the ballot papers should be exercised by the Election Court with the greatest circumspection. If it is necessary to find ballot papers, the search must be conducted by the Judge himself or by the subordinates in whose impartiality he has complete confidence. The parties themselves should never have access to the general contents of the ballot box. This irregularity does not, however, necessarily vitiate the inquiry. *(Jackson, J.)* RAMAKRISHNA REDDI *v.* NOONEY PARAKALU.

110 I. C. 342=A. I. R. 1928 Mad. 1129.

———*Interpretation—Finality of decision of Local Government.*

Rule 31 makes the decision of the Local Government final if questions arise as to the interpretation of the rules regarding the conduct of elections formulated by the Government under the District Municipalities Act, and therefore where the question raised does not relate to the interpretation of any of the rules framed by the Government but relates to the application of a specific provision of the Act, jurisdiction of the Civil Court is not ousted. The Government by constituting itself the final tribunal in interpreting the rules made by it cannot, though the rules form part of the Act, reserve to itself the exclusive right to interpret the specific provisions of the Act, thus ousting the jurisdiction of the Civil Courts: A. I. R. 1923 Mad. 475. Dist. *(Madhavan Nair and Curgenven, JJ.)* AYYATHORAI MUDALIAR *v.* MANGALA GOUNDAR,

105 I. C. 364=26 M. L. W. 460=1927 M. W. N. 766= A. I. R. 1927 Mad. 971=53 M. L. J. 375.

———*Interpretation.*

It is quite a plausible and reasonable interpretation of R. 32 that it applies when there is no chairman in charge, i. e. when there is an appointed chairman but he is temporarily absent. *(Wallace and Madhavan Nair, JJ.)* PALANIAPPA CHITTIAR *v.* KRISHNASWAMI CHETTIAR. **90 I.C. 368=22 M.L.W. 429= 1925 M.W.N. 759=A.I.R. 1925 Mad. 877= 48 M.L.J. 696.**

—S. 317 —Essentials of.

———*Disobedience of prohibition to completion.*

The offence defined in S. 317 (c) is of quite a different character from that in S. 317 (a) and that the essence of it is that after reconstruction has been commenced an order is passed to prohibit its carrying on or completion except upon certain terms and that that order is disobeyed. *(Curgenven, J.)* VENKAT SIVAYYA *v.* EMPEROR. **100 I.C. 375=25 M.L.W. 475= 38 M.L.T. 118=28 Cr. L.J. 295= 7 A. I. Cr. R. 445=A.I.R. 1927 Mad. 442.**

—S. 321 License—Cancellation of.

———*Grounds.*

The Municipality can cancel the license under S. 321 (5) only for contravention of any of its terms and it is not open to it to cancel the license for any reason that it thinks proper. *(Devadoss, J.)* CHIDAMBARAM MUNICIPALITY *v.* THIRUNARAYANA.

110 I.C. 454=51 Mad. 876=10 A.I. Cr. R. 406= 1 M. Cr. C. 129=29 Cr. L.J, 710=

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28 M. L. W, 218=1928 M.W.N. 379= A.I.R. 1928 Mad. 847=55 M.L.J. 566.

—S. 321—Structures.

———*Permission to contract obtained—License if necessary.*

When a person wants to put up roof, verandah or pandal or wall of a building of grass, leaves or mats or other inflammable materials he has to obtain the permission of the Chairman, and if he does not obtain the permission of the Chairman, he is liable to penalty under S. 313. But after he has once obtained permission to put up a structure of the kind mentioned in S. 195, he is not bound to obtain a license from year to year: S. 321, Cl. 7, does not apply. *(Devadoss, J.)* CONJEEVARAM MUNICIPALITY *v.* NAGESWARA IYER. **109 I.C. 361=1928 M.W.N. 291= 28 M.L.W. 144=29 Cr. L.J. 537= 51 Mad. 870=1 M. Cr. C. 209= A.I.R. 1928 Mad. 846=54 M.L.J. 642.**

—S. 328—Notification.

———*Improperly notified—Effect on election.*

Holding of an election by the Chairman of a Municipality under notification of the Governor in Council under S. 43 of the Madras District Municipalities Act not properly notified under S. 328 of the Act does not give a cause of action to a voter for an injunction against the Municipality. *(Jackson, J.)* MAHOMED MEERA *v.* P. DURAISAMI NAIDU. **97 I. C. 172= 1926 M.W.N. 582=A.I.R. 1926 Mad. 1147.**

—S. 338—Jurisdiction.

———*Rules—Enquiry into validity.*

It is not within the province of a Criminal Court to determine whether the rules framed under the Act have been validly framed. The matter should be left for determination in Civil Court. *(Phillips, Wallace and Jackson, JJ).* MUTHU BALU CHETTIAR *v.* MADURA MUNICIPALITY. **105 I.C. 686=39 M.L.T. 548= 1927 M.W.N. 835=28 Cr.L.J. 974=27 M.L.W. 239= 9 A.I. Cr. R. 127=A.I.R. 1927 Mad. 961= 53 M. L. J. 633 (S.B.).**

—S. 338—License—Cancellation of.

———*Validity of order of cancellation—Inquiry into validity.*

Where the accused has properly obtained a license, the improper or illegal cancellation of it does not deprive him of the license, the terms of which he has not in any way violated. The criminal Court, in trying the accused in such cases under S. 338, can inquire into the validity of an order of cancellation and, if the order is *ultra vires*, the license can be treated as not cancelled. *(Devadoss, J.)* CHIDAMBARAM MUNICIPALITY *v.* THIRUNARAYANA. **110 I. C. 454= 51 Mad. 876=28 M.L.W. 218=1928 M.W.N. 379= 10 A. I. Cr. R. 406=1 M.Cr. C. 129= 29 Cr. L. J. 710=A. I. R. 1928 Mad. 847= 55 M. L. J. 566.**

—S. 338—Scope.

———*Commission agent.*

A commission agent, who is not merely an auctioneer or crier, selling grain wholesale on account of his customers for commission is also required to take out license. *(Krishnan, J).* PUBLIC PROSECUTOR *v.* KALIA PERUMAL. **93 I.C. 701=49 Mad. 432= 23 M.L.W. 642=27 Cr. L.J. 477= A.I.R. 1926 Mad. 722=50 M.L.J. 654.**

—S. 347—Notice

———*Time for prosecution.*

Where no steps have been taken to enforce the first requisition issued by the Chairman under Ss. 146 and 149, a Chairman is entitled to make a second and to institute a prosecution for failure to comply with it; and a prosecution launched within three months of

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second notice but beyond three months of the first is not barred: *Jackson, J.*, in Cr. R. C. No. 164 of 1925, (Madras) Foll: A. I. R. 1925 Mad. 1067, Not Foll. (*Devadoss and Waller, JJ.*) RAMCHANDRA CHETTY, *In re*. **96 I. C. 500=49 Mad. 880=27 Cr. L. J. 948= A. I. R. 1926 Mad. 763=50 M. L. J. 557.**

—S. 350—Scope.

———*Illegal Collection of tax and Company—Suit recovery—Applicability of Sec.* 350.

A suit by a company to recover money wrongly collected from it by a municipality as tax, is not one for "damages or compensation" but is an equitable action for money had and received, and, as such, the provisions of S. 350 either as regards the necessity for notice or the limitation of six months do not apply to it: A. I. R. 1918 P. C. 241, Foll. (English Case Law discussed). (*Coutts-Trotter, C. J. and Madhavan Nair, J.*) MUNICIPAL COUNCIL, DINDIGAL *v.* BOMBAY CO., LTD. **120 I. C. 867=52 Mad. 207=29 M. L. W. 525= 1929 M. W. N. 225=A. I. R. 1929 Mad. 409= 56 M. L. J. 525.**

———*Suit for return of tax—Applicability of Sec.* 350.

A suit for the return of the company's tax alleged to have been paid where the company was not liable to pay it is neither a claim for damages nor one for compensation. (*Beasley, J.*) BOMBAY CO, LTD. *v.* MUNICIPAL COUNCIL, DINDIGAL. **108 I. C. 216= 27 M. L. W. 243=A. I. R. 1929 Mad. 146.**

—S 352—Rejection of nomination paper—

———*Remedy of candidate.*

The general right of being nominated to stand as a candidate for Municipal Election is a legal character. This legal character is itself the creation of a specific statute, the District Municipalities Act (V of 1920), and it is settled law that where a statute itself sets up a proper tribunal for trying cases of the infringement of the right to such a legal character and that tribunal has functioned judicially, the Civil Court will have no jurisdiction. The Local Government is the final arbiter for deciding what the rules mean, and the Civil Court cannot ordinarily be asked to decide whether the Local Government's interpretation of its own rules is right or wrong. But where the proper tribunal has declined jurisdiction and the aggrieved party is thus bereft of his statutory and constitutional remedy, it is the province of the Civil Court as a Court of Equity to fill the vacuum created and to exercise the jurisdiction which the proper tribunal has failed to exercise. It cannot be admitted that the order of the Chairman in the matter of interpretation of the rules is absolutely final. The correct principle is that when a duly constituted tribunal has refused to try the question of the right of a party to the legal character of one entitled to be nominated to stand as candidate for an election, and there is no other remedy available, the ordinary Civil Court has jurisdiction to entertain a suit for that relief and the right to grant a proper temporary injunction retaining matters in *status quo ante* until the suit is tried. Where the election has taken place, the remedy of the candidate whose nomination paper had been wrongly rejected by the Chairman is to file election petition to Sub-Judge or District Judge but not a civil suit nor can he restrain the elected candidate from doing his duties as a Commissioner. (Case-law discussed) (*Schwabe, C. J., and Wallace, J.*) SARVOTHAMA RAO *v.* CHAIRMAN, M. C., SAIDAPET. **73 I. C. 619=47 Mad. 585=17 M.L.W. 431= 32 M.L.T. 178=1923 M.W.N. 266= A.I.R. 1923 Mad. 475=45 M.L.J. 23=**

—S. 354—Assessment—

———*Failure to serve notice of enhancement—Right to recover excess.*

Where the provisions of the Act have not been complied with, namely, service of notice upon the assessee of the enhanced assessment, a suit would lie to recover the excess tax collected. (*Devadoss, J.*) MD. SHAMSUDDIN ALIM *v.* TIRUVALUR MUNICIPALITY. **106 I.C. 529=A.I.R. 1928 Mad. 348.**

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———*Suit against Council.*

The sub-section is intended to provide real protection to the Chairman and the council and its effect is that, when they have proceeded in the matter of assessment in accordance with the Act, no suit will lie against them even if their actual decision is wrong. (*Reilly, J.*) LAKSHMANAN CHETTY *v.* MUNICIPALITY, TRICHINOPOLY. **106 I. C. 659= A.I.R. 1928 Mad.208.**

———*Unauthorised charges—Duty of Council.*

A Municipal Council cannot impose charges not under the authority of the Act, and then, when a suit is filed for their recovery, allot the money thus unlawfully obtained to some demand alleged to be under the authority of the Act and plead that no suit lies. Large powers are conferred upon these local bodies upon the strict understanding that they observe the conditions of the statute to which they owe their origin, and to allow them levy taxes upon private persons without such strict compliance would be a grave scandal. At any rate the Courts have no power to relieve local bodies from the statutory obligations imposed upon them.

A Municipality levied a certain sum of money as profession tax which was paid under protest and an appeal was preferred to the Council on the ground that the Company had been exempted from payment of profession tax by a decree of Court. Failing to get any reply, the Company after giving the usual notice of suit under the District Municipalities Act filed a suit for refund of the amount paid; it was held that the suit was maintainable. (*Jackson, J.*) KRISHNA JUTE AND COTTON MILLS CO. LTD., *v.* MUNICIPAL COUNCIL, VIZAYANAGRAM. **91 I.C. 297= 22 M.L.W. 619=A.I.R. 1926 Mad. 152= 49 M.L.J. 542.**

—S. 354—Bar to suit—

———*Compliance to Act.*

Under S. 354 (2) a suit against a municipality to recover money is only barred, if the provisions of the Act have been in substance and effect complied with. (*Madhavan Nair and Curgenven, JJ.*) MUNICIPAL COUNCIL, CUDDALORE *v.* KRISHNA. **105 I.C. 147= 50 Mad. 987=26 M.L.W. 439=39 M.L.T. 487= 1927 M.W.N. 922=A.I.R. 1927 Mad. 968= 54 M.L.J. 147.**

—S. 354—Illegal levy.

———*Payment under protest.*

Where a person carrying on moneylending business at Hyderabad and spending his vacation at S, was charged professional tax for carrying on the business within S Municipality and it was not proved that he resided within the S Municipal limits for 60 days: it was held that his suit to recover the tax paid under protest was incompetent in view of S. 354 (2) and 4th Sch., Cl. 28; 19 Mad. 10, Foll. (*Viswanatha Sastri, J.*). KRISHNAMACHARIAR *v.* MUNICIPAL COUNCIL, SRIRANGAM. **91 I. C. 933= 24 M. L. W. 218= A. I. R. 1926 Mad. 448=50 M. L. J. 77.**

—S. 354—Scope.

———*Right to levy tax.*

Where a Municipality levies a tax upon a person who is not liable to pay it, such an act is not in compliance either in substance or in effect with the provisions of the Act: 24 Mad. 205 and 27 Mad. 547, Foll (*Beasley, J.*) BOMBAY CO. LTD. *v.* MUNICIPAL COUN-

MAD. DIST. MUN. ACT, (1920) S. 362—Applicability.

CIL, DINDIGUL. **108 I. C. 216=27 M. L. W. 243=**
A. I. R. 1929 Mad. 146.

—S. 362—Applicability of.

———*Limitation.*

Section 362 does not govern encroachment on street —Three months' rule of limitation applies to both Sections 362 and 180. (*Krishnan, J*). JAGANNADHAM NAIDU *v.* CH. RAMA RAO. **85 I. C. 646=**
20 M. L. W. 834= 26 Cr. L. J. 550=
A. I. R. 1925 Mad. 186=47 M. L. J. 917.

—S. 362—Other material.

———*Trees on municipal land when cut.*

Trees which are upon land vested in the Municipal Council are, when cut, "other material" within the meaning of S. 362. (*Krishnan Pandalai, J.*) VEERARAGHAVA *v*, MUNICIPAL COUNCIL, VANIYAMBADU.
(1930) M.W.N. 684.

—S. 365—Notification.

———*Validation by subsequent act.*

A notification by a Municipal Council constituted under the old District Municipalities Act of 1884 directing dealers in wholesale grain to take out a license under S. 249 of the new Act V of 1920 and issued before that Act actually came into force is *ultra vires*. The notification being neither a rule, nor a bye-law, nor a Regulation cannot be validated under the proviso to S. 365 of that Act. (*Oldfield and Krishnan, JJ*). SESHA PRABHU *v.* EMPEROR.
66 I. C. 429=1922 M. W. N. 79=31 M. L T. 314=
A.I.R. 1921 Mad. 713=42 M. L. J. 149.

—Sch. 4, R. 7—Provisions mandatory.

———*Omission to give necessary information in assessment lists—Revision proceedings whether rendered illegal.*

R. 7 of Sch. IV is imperative in language that the Chairman shall enter the annual value of all lands and buildings determined by him and the tax payable thereon in assessment books to be kept for the purpose of the Municipal Office. The omission to give the necessary information to the assessees in the assessment lists prepared by the committee is by itself sufficient to render the revision proceedings illegal. (1921) I. K. B. 277 and 52 M. 779 relied on. (*Madhavan Nair, J.*) VASUDEVA RAO *v.* MUNICIPAL COUNCIL, ANANTAPUR. **(1930) M.W.N. 821.**

—Sch. 4, R. 8—Quinquennial revision.

———*Procedure prescribed not adopted—Validity of revised assessment—Municipal Account Code Art. 70.*

Held that assuming that the Chairman of the Municipality has the power to delegate the work of revision of the assessment lists in the case, in the absence of his statement in writing of the amount of assessment as revised and his certificate of its correctness, cannot be said to be revised within the meaning of R 8, Sch. 4 as the procedure prescribed in Art. 70 of the Municipal Account Code had not been complied with. Such an omission cannot be brushed aside as a mere irregularity. (*Madhavan Nair, J.*) VASUDEVA RAO *v.* MUNICIPAL COUNCIL, ANANTAPUR.
1930 M.W.N. 821.

—Sch. 4, R. 9—Omission to fix date for objections—

———*Illegality or irregularity.*

R. 9 of Sch. IV makes it obligatory on the Chairman to notify a specified date for hearing objections, if any, to the revised assessment. It is doubtful however if the omission to mention the specific date for hearing the objection is such a vital defect as will vitiate the entire proceedings relating to the revision assessment. (*Madhavan Nair, J.*) VASUDEVA RAO *v.* THE MUNICIPAL COUNCIL, ANANTAPUR.
(1930) M.W.N. 821.

MAD. DIST. MUN. ACT. (1920) Sch. 4, para. 31—Distraint warrant.

—Sch. 4, Para 15—Assessment.

———*Amendment of—Retrospective operation.*

The amendment of an assessment can be made at any time within three years so as to operate retrospectively. (*Ramesam and Jackson, JJ*). MUNICIPAL COUNCIL, KUMBAKONAM. *v.* SOUTH INDIAN RY. CO.
121 I. C. 854=52 Mad. 792=30 M. L. W. 271=
A. I. R. 1929 Mad. 849=57 M. L. J. 251.

—Sch. 4, Para 16—Scope.

———*Option to be assessed.*

The assessee has the option of being assessed under the section or under the proviso. (*Madhavan Nair and Phillips, JJ.*) BERHAMPORE COUNCIL *v.* THE ORIENTAL GOVT. SECURITY LIFE ASSURANCE CO. LTD. **A. I. R. 1926 Mad. 944.**

—Sch 4, Para 18—Interpretation.

———"*Principal.*"

The natural construction of the word "principal" is that it qualifies both "office" and "place of employment." (*Phillips and Madhavan Nair, JJ*). MUNICIPAL COUNCIL, MANGALORE *v.* PARRY & CO.
98 I.C. 513=1926 M. W. N. 822=
A. I. R. 1926 Mad. 1187=52 M. L. J. 360.

—Sch. 4, Para 28—Scope.

———*Power to levy.*

Rule 28, Sch. 4 has reference to an assessment or demand which the municipality was empowered by the Act to make. (*Madhavan Nair and Curgenven, JJ.*) MUNICIPAL COUNCIL, CUDDALORE *v.* KRISHNA.
105 I. C. 147=50 Mad. 987=26 M. L. W. 439=
39 M. L. T. 487=1927 M. W. N. 922=
A. I. R. 1927 Mad. 968=54 M. L. J. 147.

—Sch. 4, Para 30—Distraint warrant.

———*Signature by fascimile—Validity of.*

Where an officer leaves a facsimile stamp of his signature behind him, which the peons continue to use, a warrant issued stamped by such facsimile is quite irregular and invalid. (*Jackson, J.*) D. MADAR SAHIB *v.* EMPEROR. **1930 Cr. C. 335=**
31 M. L. W. 205=1930 M. W N. 172=
3 M. Cr. C. 90=31 Cr. L. J. 639=
A. I. R. 1930 Mad. 430=58 M.L.J. 193.

—Sch. 4, Para 30—Warrant.

———*Signature of Chairman—General Clauses Act* 3 (28), *Warrant most be issued under sign.*

Under the District Municipalities Act a warrant must bear the signature of the Chairman. Signature must be taken in its accepted sense of sign manual. The fact that in S. 2 (20), C. P. Code sign is used as including stamp has no bearing on the Madras District Municipalities Act. But if the Chairman happens to be illiterate, under S. 3 (29). Madras General Clauses Act, he may affix his mark. (*Jackson, J*). D. MADAR SAHIB *v.* EMPEROR.
1930 Cr. C. 335=31 M.L.W. 205=
1930 M.W.N. 172=3 M. Cr. C. 90=31 Cr. L. J. 639=
A.I.R. 1930 Mad. 430=58 M.L.J. 193.

—Sch. 4, Para 31—Distraint warrant.

———*Right to take the front door—Penal Code, Sec.* 332.

A distrainer having a warrant has no right to take the front door of a house, and if he threatens to do so, such a proceeding renders the house unsafe calling for immediate defence of private property. Further if the accused resists such attempts he cannot be said to have exceeded his right of self-defence and any conviction under Penal Code, S. 332, is liable to be set aside : 13 Mad. 518, Foll. (*Jackson, J.*) D. MADAR SAHIB *v.* EMPEROR, **1930 Cr. C. 335=**
31 M.L.W. 205=1930 M.W.N. 172=3 M. Cr .C. 90=
31 Cr. L. J. 639 =A. I. R. 1930 Mad. 430=
58 M. L. J. 193

MAD, DIST. MUN. ACT, (1920) Sch. 4, para 61,—Certiorari writ.

—Sch. 4, Para 61—Certiorari writ.

The remedy by way of an issue of a *writ* of *certiorari* is not open to aggrieved persons under the District Municipalities Act. *(Odgers and Madhavan Nair, JJ.)* MD. RAZA SAHEB *v.* SADASIVA ROW. **92 I. C. 918=49 Mad. 49=1926 M. W. N. 467=A. I. R. 1926 Mad. 297.**

—Sch. 5—Scope.

———*Commission agent—License.*

A commission agent who is not merely an auctioneer or crier, selling grain wholesale on account of his customers for commission is also required to take out license. *(Krishnan, J.)* PUBLIC PROSECUTOR *v.* KALIA PERUMAL NAICKER. **93 I.C. 701=49 Mad. 432=23 M. L. W. 642=27 Cr. L. J. 477=A. I. R. 1926 Mad. 722=50 M. L. J. 654.**

—Sch. 5, Cl. (q)—Interpretation.

———*'Handloom.'*

Handlooms which are worked without steam power or electric power, but only with the hand cannot be called machinery within the meaning of Cl. (q). *(Devadoss, J.)* CANNANORE MUNICIPAL COUNCIL, *v.* ANANDAN. **108 I. C. 740=51 Mad. 601=27 M.L.W.728=A.I.R.1928 Mad. 683=54 M.L.J. 454.**

———*'Dangerous to human life or health'*

(Quaere). Whether the words "which is likely to be dangerous to human life or health" in Cl. (q), govern the words "any fuel or machinery." *(Phillips, Wallace and Jackson, JJ.)* MUTHU BALU CHETTIAR *v.* MADURA MUNICIPALITY. **105 I. C. 686=27 M.L.W. 239=39 M.L.T. 548=1927 M.W.N. 835=28 Cr. L. J. 974=9 A. I. Cr. R. 127=A. I. R. 1927 Mad. 961=53 M. L. J. 633 (S. B.)**

———*'Dangerous to human life.'*

The expression "machinery likely to be dangerous to human life" in Sch. 5 (q) is not confined to machinery dangerous to the outside public as human life means the life of any person whether he be within or without the premises of the factory. *(Jackson, J.)* PUBLIC PROSECUTOR *v.* RANGANAYAKULU CHETTIAR. **101 I.C. 667=28 Cr.L.J. 491=38 M.L.T. 373=8 A. I. Cr. R. 140=50 Mad 845=25 M.L.W. 768=A. I. R. 1927 Mad. 602=52 M.L.J. 653.**

—Sch. 5. Cl. (q)—Machinery.

———*Collection of Maggoms.*

A collection of maggoms is not machinery under Sch. 5 (q), and so a lisense is not necessary for its use. *(Jackson, J.)* KRISHNAN *v.* MUNICIPAL PROSECUTOR, CANNANORE MUNICIPALITY. **92 I.C. 873=23 M.L.W. 413=1926 M.W.N. 463=27 Cr.L.J. 361=A.I.R. 1926 Mad. 430.**

MADRAS DISTRICT MUNICIPALITIES AND LOCAL BOARDS AMENDMENT ACT (2 of 1922).

—Election of President.

———*Oath.*

Election of a President by persons who had not taken the oath is invalid. *(Spencer and Devadoss, JJ.)* RAJAHBHADAR MUDALIAR *v.* VISVANATHA REDDI. **75 I.C. 620=A.I.R. 1924 Mad. 515=45 M.L.J. 543.**

MADRAS EDUCATIONAL RULES (1918.)

—Corporal punishment—Principles.

———*Teacher and Pupil.*

A teacher can just like parent inflict corporal punishment. But, if it be administered for the gratification of passion or of rage, or if it be immoderate, and excessive in its nature or degree or if it be protracted beyond the child's powers of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life or limb, in all such cases the punishment is excessive and the violence is unlawful.

MAD. EST. LAND ACT, (1908)—Intention.

The schoolmaster cannot escape liability merely on the ground that chastisement administered to the pupil has not left on the pupil's body any marks of violence or injury. Cases are not uncommon in this country of punishments of extremely grotesque character being indicted involving danger to life or limb of the pupil or resulting in a state of prostration on the part of the pupil and Courts will certainly discountenance resort by the schoolmaster to such barbarous and inhuman forms of correction. *(Oldfield and Venkatasubba Rao, JJ.)* P. SANKUNNI *v.* C. S. VENKATARAMANI. **67 I.C. 514=45 Mad. 548=15 M.L.W. 501=1922 M.W.N. 246=31 M.L.T. 26=A.I.R. 1922 Mad. 200=42 M.L.J. 460.**

MADRAS ELECTION ENQUIRY RULES.

—R. 1—Jurisdiction—

———*"District or Subordinate Judge having Jurisdiction"—Meaning of.*

Rule 1 does not say that the petition can be presented to the District or Subordinate Judge having jurisdiction over the election or over any place where any act included in the term "election" is done, but merely to the District or Subordinate Judge "having jurisdiction": that means having jurisdiction over the place of the acts or omissions complained of: A.I. R. 1929 Mad. 727, Rel. on. *(Reilly, J.)* K. C. KUTTY *v.* VYDIARAKATH KUNHALI HAJI. **A.I.R. 1930 Mad. 832.**

MADRAS ELEMENTARY EDUCATION ACT (8 of 1920.)

—S. 34—Education tax.

———*Right of landholder to recover from tenant.*

With respect to education tax leviable under S. 34, there is no statutory provision to enable the landholder to collect any portion of it from the tenant. The landholder's claim, therefore, to recover education tax from his tenants, should be based upon a contract. *(Sundaram Chetty, J.)* NAGABHUSHANAM *v* VENKANNA. **120 I.C. 371=53 Mad. 151=30 M.L.W. 807=A.I.R. 1930 Mad. 21=57 M.L.J. 726.**

—S. 36—Education tax.

———*Land-cess—Distinction.*

The education tax under S. 34 should be treated as an addition to the land-cess and is recoverable along with the said land-cess as an integral part of it. That being so, the rule did not declare that the education tax was *ipso facto* land-cess or should be deemed to be land cess for all purposes. *(Sundaram Chetty, J.)* NAGABUSHANAM *v.* VENKANNA. **120 I.C. 371=53 Mad. 151=30 M.L.W. 807=A.I.R. 1930 Mad. 21=57 M.L.J. 726.**

MADRAS ESTATES LAND ACT (I of 1908.)

—Inam—Applicability of Act.

The consideration that a person is the owner of both the varams is material in determining the applicability of the Estates Land Act, only where the land is a whole village and an enfranchised inam. *(Ramesam, J.)* BHUJANGA RAO *v.* PERIATHAMBI GOUNDAN. **92 I.C. 1047=A.I.R. 1926 Mad. 635.**

The Act applies if the inam in question is part of the Pittapur Estate, apart from the question whether the defendant is a ryot. 45 M. 716 (F.B.) A.I.R. 1922 M. 373 Rel. *(Oldfield and Ramesam, JJ.)* NOOKAYYA *v.* BHEEMANNA. **73 I.C. 733=17 M.L.W. 712=1923 M.W.N. 176=A.I.R. 1923 Mad. 454=45 M.L.J. 91.**

—Intention—

———*Acquisition of occupancy right.*

MAD. EST. LAND ACT, (1908) Occupancy right.

The Madras Estates Land Act (1908) intended not only to confirm existing occupancy rights, but all the cultivating tenants in possession at the time of the coming into force of the Act acquired occupancy rights even though they did not have such rights before: A.I.R. 1922 P.C., 292, Ref. *(Wallace and Madhavan Nair, JJ.)* RAMASAMI *v.* TIRUPATHI.
98 I.C. 291=24 M.L.W. 460=A.I.R. 1926 Mad. 1167=52 M.L.J. 259=50 Mad. 10.

—Occupancy right—Proof of.

———*Acts amounting to.*

Where both the Kudivaram and Melvaram rights were granted to the Agraharamdhar along with the agraharam and land was subsequently let out to tenants who claimed occupancy rights therein, *held*, that the tenants were not occupancy tenants, under the Act and further that payments of cash rents for long time by the tenants do not preclude the landlord from varying the terms of the rent, and that mere uniform payment of rent, construction of wells, execution of mortgages, etc., by the tenants did not amount to proof of occupancy rights. *(Jackson, J.)* P. CHENGA REDDI *v.* S. VENKATALAKSHMI NARASAYYA. **20 M.L.W. 549=35 M.L.T. 56=1924 M.W.N. 761=A.I.R. 1925 Mad. 274.**

—Policy of Act

———*Notice of change in terms of holding.*

The policy of the Madras Estates Land Act would seem to be that ryots should know the exact terms and conditions on which they are holding the properties for any particular fasli, and in case there should be any important changes in the terms of the holding they must have some reasonable notice of the same. That such is the intention is clear from the wording of several sections of the Act. *(Anantakrishna Ayyar, J.)* SUNDARAM AIYER *v.* KULATHU IYER. **123 I.C. 351=A.I.R. 1930 Mad. 61.**

—Presumption—Jeroyati land.

———*Land ceasing to be service inam.*

Under the Estates Land Act, the presumption is that all land is *Jeroyati* land, and once the land ceases to be service inam land it resumes its character of ordinary *jeroyati* land, without any 'formal' ceremonies being gone through. *(Sadasiva Iyer and Napier, JJ.)* SHREE VARADARAJA *v.* KANDA BARIKIVADU. **63 I. C. 8=44 Mad. 637=15 M. L. W. 150=1921 M. W. N. 565=A. I. R. 1925 Mad. 119=40 M. L. J. 466.**

—S. 3—'Estate'.

———*Lands granted in* 1798

Lands granted in Inam in 1798 cannot be treated as part of the estate within the meaning of S. 3 merely because it was not proved that the rentals on them had been deducted from the assets of the Zamindari for the purpose of assessing peishcush. The fact that Inam was granted prior to 1802 may raise a rebuttable presumption that the land so granted was excluded from the permanent settlement. *(Ayling and Odgers, JJ.)* TATA VARAHALIAH *v.* RAJAHVATSAVAYA VENKATA. **75 I. C. 465=18 M. L. W. 324=1923 M.W. N. 732=A. I. R. 1924 Mad. 117.**

———*Grant of both warams subject to quit-rent—Grantee if landholder.*

The suit lands were originally ryoti lands situated within the permanently settled Zamindari of Surangi, which was an estate within the meaning of the Madras Estates Land Act; they were granted by the Zamindar after permanent settlement on a quit-rent, payable to himself, of Rs. 15 per annum. The grant included both varams, it was held, that the Inamdar was a landholder within the meaning of the Act and that his tenants had occupancy rights. (Per Ayling and Coutts Trotter, JJ., Kumaraswamy Sastri, J, dissenting). *(Ayling, Coutts-Trotter and Kumaraswami Sastri, JJ.)* GADADHARADAS, BAVAJI *v.* SURYANARAYANA. PATNAIK. **64 I. C. 317=44 Mad. 677=14 M. L. W. 463=1921 M. W. N. 413=A. I. R. 1921 Mad. 547=41 M. L. J. 97.**

MADRAS EST. LAND ACT. (1908) S. 3 (2) (b)—Estate.

—S. 3—Landholder.

———*Post settlement—Inam grant*

Where a Zamindar makes a post settlement inam grant of a portion of a village with both varams on a permanent *kattubadi*, *Held*: The grantee is a landholder within the definition in section 3 (5) of the Madras Estates Land Act. *(Schwabe, C. J., Oldfield, Phillips, Devadoss, and Venkatasubba Rao, JJ.)* JARUGUNILLI BRAHMAYYA *v.* CHALLAGHALI ACHIRAJU. **70 I. C. 615=45 Mad. 716=1922 M. W. N. 280=31 M. L. T. 91=A. I. R. 1922 Mad. 373=43 M. L. J. 229.**

—S. 3 and 4—Mokasas

———*If part of estate.*

Where it appeared that the Mokhasas were not excluded from the Zamindari at the time of the Permanent Settlement and were originally granted as Mokhasas, held, that they form part of an estate which is not within the jurisdiction of the Civil Courts. Even a minor Inamdar in a Mokhasa is a landholder. The character of Mokhasas is not changed by mere exchange of lands. *(Spencer and Kumaraswami Sastry, JJ.)* LAKSHMI NARASIMHAM *v.* VEERABADRA **78 I. C. 287=19 M. L. W. 671=1924 M. W. N. 244=A. I. R. 1924 Mad. 589**

—S. 3 (2) (b)—Estate.

———*Question one of fact or law.*

Whether a village is an estate under the Madras Estates Land Act, is a mixed question of fact and law. *(Wallace, J.)* THIRUMALAYAPPA *v.* KARUPPAYEE **106 I. C. 505=A. I. R. 1928 Mad. 375.**

———*Proof of*

A finding that some of the tenants have for some years past exercised occupancy rights is of no help, in proving that a village is an estate, since it is not open to the Court to infer retrospectively from recent documents that the original grant in 1775 was of the melwaram only: A. I. R. 1924 P. C. 65, Ref. to. *(Wallace, J.)* THIRUMALAYAPPA *v.* KARUPPAYI **106 I. C. 505=A. I. R. 1928 Mad. 375**

———*Arya Goundan Jaghir*

Ramesam, J.—Ariya Goundan Jaghir, situated in the Kalroyan hills is an "estate" within the Act.

By Court.—The relationship of landlord and tenant exists between the jaghirdar and the tenants who are entitled to the minor produce of olavakkadu lands and ponalkadu lands during the time they retain that character. *(Phillips and Ramesam, JJ.)* THANAPPA CHETTY *v.* ESUF KHAN. **92 I. C. 753=23 M. L. W. 36=A. I. R. 1926 Mad. 853**

———*Shrotriemdar divesting himself of Kudivaram right—Village, if estate.*

Even if at the time of suit by a shrotriemdar to recover arrears of rent, the shrotriemdar has only the melwaram right, for the purpose of jurisdiction, the question is whether, at the time of the grant, he had not the kudivaram right also. If the shrotriemdar was originally the kudivaramdar and the melwaram also was granted to him, but he divested himself of the kudivaram right, the village is not an "estate" within the meaning of S. 3 (2) (*d*) and the Civil Court has jurisdiction to try the suit. *(Spencer, J.)* C. SUBBAYYA *v.* L. SRINIVASA RAO. **90 I. C. 269=**

MAD. EST. LAND ACT, (1908) S. 3 (2) (b)—Inam or Jaghir.

21 M. L. W. 694=A. I. R. 1925 Mad. 1081=49 M. L. J. 126.

—S. 3 (2) (b)—Inam or Jaghir—Interpretation.

———*Exception to Sec. 8—Applicability of.*

Two villages in the District of Chingleput were granted by the Nawab of Carnatic to a lady of his family. The villages were purchased by the Nawab and were then mortgaged by him and the mortgage was never redeemed. The mortgage was executed when the Nawab was still sovereign of the Carnatic. At first the mortgagee did not possess the kudivaram rights in the village, but afterwards he acquired the mirasidar rights and became entitled to the kudiwaram also in respect of the suit plots in the villages.

Held: that inasmuch as the original grant was to the lady of the family it was not a jagir within the meaning of Cl. (c) but was an inam within the meaning of Cl. (d), because the grant having been made by a sovereign authority must be taken to have been recognized by the British Government under Regn. 31 of 1802. And so it was an estate within the meaning of the Act. But since the mortgagee, inamdar, subsequently acquired the mirasi rights and became entitled to the kudivaram in the suit plots, the plots would be covered by the exception to S. 8 and so would not be governed by the Estates Land Act and so a civil Court had jurisdiction to try the suit: 40 Mad. 654, Ref. *(Ramesam and Venkatasubba Rao, JJ.)* RAMALINGA MUDALI *v.* RAMASWAMI AYYAR. **119 I. C. 577=29 M. L. W. 760=1929 M. W. N. 239=A. I. R. 1929 Mad. 529.**

———*Distinction.*

In a very general sense it may be true that all jagirs are inams, but there is a real difference between the two terms as used in S. 3 (2) (c) and (d) of the Act. Inam implies a grant of land with remission partially or totally of the revenue while a jagir is a grant merely of the revenue. Jagir is a grant of landed property for life or a definite number of lives in lieu of pension for services, usually military, rendered to Government, in order that the grantee may maintain a certain dignity and state. The term is used in the Act in a restricted sense and means an estate in the nature of zamindari or paliyam or assignment of land revenue held on military service capable of being permanently settled but for some reasons, not so settled: A. I. R. 1926 Mad. 1167; A. I. R. 1918 P. C. 203; 3 Bom. 186; A. I. R. 1923 P. C. 217; A. I. R. 1918 P. C. 169; 36 Bom. 639 (P. C.), Rel. on.; 40 Mad. 664, Not Appr. *(Ramesam and Venkatasubba Rao, JJ.)* RAMALINGA MUDALI *v.* RAMASWAMI AYYAR. **119 I. C. 577=29 M. L. W. 760=1929 M. W. N. 239=A. I. R. 1929 Mad. 529.**

—S. 3 (2) (c)—Interpretation.

———*'Payable'—'Estate'—'Landholder'—Meaning explained.*

"Payable" means payable according to the terms of the contract between the parties to it. S. 3, cls. (11) and (15) are applicable, whatever the stage or stages at which those terms so far as they relate to payment for the use of the land have to be or have been fulfilled. Whether plaintiff's inam is an estate within the meaning of S. 3 (2) and plaintiff is a landholder under S. 3 (5) depends on whether the inam was created before or after the Permanent Settlement in 1802. *(Oldfield and Ramesam, JJ.)* NOOKAYYA *v* BHEEMANNA. **73 I. C. 733=17 M. L. W. 712=1923 M. W. N. 176=A. I. R. 1923 Mad. 454=45 M. L. J. 91.**

———*"Unsettled".*

MAD. EST. LAND ACT, (1908) S. 3 (2) (d)—Swamibhogam.

The word "unsettled" in S. 3 (2) (c) governs not only "palaiyam" but it also governs "Jagir." *(Wallace and Madhavan Nair, JJ.)* RAMASAMI *v.* TIRUPATHI. **98 I. C. 291=50 Mad. 10=24 M. L. W. 460=A. I. R. 1926 Mad. 1167=52 M. L. J. 259.**

—S. 3 (2) (c)—Jagir.

The term "jagir" in S. 3 (2) (c) cannot be limited only to jagirs granted before the advent of the East India Company. *(Wallace and Madhavan Nair, JJ.)* RAMASAMI *v.* TIRUPATHI. **98 I. C. 291=50 Mad. 10=24 M. L. W. 460=A. I. R. 1926 Mad. 1167=52 M.L.J. 259.**

———*Usee of word 'Jagir' in grant—Property is not necessarily a Jagir.*

The mere use of the word 'Jaghir' in a grant does not make the property a Jaghir. *(Devadoss, J.)* THIRUPATHI GOUNDAN *v.* SHAMANNA GOUNDAN. **86 I. C. 182=21 M. L. W. 118=A. I. R. 1925 Mad. 477=48 M. L. J. 654.**

—S. 3 (2) (c)—Mafooskhanpet—Jagir.

———*Applicability of Act.*

The estate known as Mafooskhanpet being a jagir within the meaning of S. 3, the Act applies: 40 Mad. 664, Ref. *(Phillips and Pandalai, JJ.)* CHOKALINGA CHETTY *v.* KOLAGIRI MUNIGAN. **122 I. C. 47=A. I. R. 1930 Mad. 569.**

—S. 3 (2) (d)—Estate.

———*Grant of revenue only—Proof of—Presumpton—Minor inams.*

Any person asserting that the land was an 'estate' has to prove that the grant was of the land revenue only to a person not owning the kudivaram, and if he could not establish this affirmatively he must fail. There is no presumption at any rate in the case of minor inams of less than a village in extent that there were occupancy ryots on the land at the time of the grant. The position of these inamdars is that of pattadars holding under Government on favourable terms, and the proprietary interest presumably transferred to them by their grants is sufficient to throw the burden of proving the existence of permanent tenancy or occupancy rights in the first instance on the tenants who set up such right. The P. C. cases 41 Mad. 1012 (P. C.) and 43 Mad. 166 (P. C.) do not expressly lay down a presumption that the grants are of both the melvaram and kudivaram, as such a ruling was not necessary for the purpose of those cases, but such an initial presumption is deducible from the grounds on which the judgments are based. *(Wallis, C. J. Coutts-Trotter and Ramesam, JJ.)* MUTHU GOUNDAN *v.* PERUMAL IYEN. **63 I. C. 790=44 Mad. 588=1921 M.W.N. 263=13 M. L. W. 483=A. I. R. 1921 Mad. 145=40 M. L. J. 429.**

—S. 3 (2) (d)—Inam.

———*Applicability of act—Proof of.*

An inam, not being a darimila inam, excluded from the scope of the permanent settlement, and whether enfranchised or not, is not governed by the Act, unless it is an inam of the whole village and the conditions of S. 3 (2) (d) of the Act are satisfied. The burden of proving that the inam is of the whole village and that the conditions of S. 3 (2) (d) are satisfied lies on the party who wants to oust the jurisdiction of the civil Court. *(Ramesam, J.)* NARAYANA DOSS *v.* SANKARASUBBIAR. **91 I. C. 571=21 M. L. W. 692=1925 M. W. N. 568=A. I. R. 1925 Mad. 1197.**

—S. 3 (2) (d)—Swamibhogam.

———*Meaning of.*

The term 'Swamibhogam' usually implies that the ownership in the soil vests in the person who is en-

MAD. EST. LAND ACT, (1908) S. 3 (2) (e)—Settlement Inam.

titled to swamibhogam. (*Sadasiva Aiyar and Napier, JJ.*) SUBRAMANIA KARALAYAM *v.* SIVASUBRAMANIA PILLAI. **62 I. C. 750=14 M. L. W. 40=A. I. R. 1921 Mad. 233=41 M. L. J. 175.**

—S. 3 (2) (e)— Inam & Jagir.

Mere loose popular description of an inam as jagir is not enough to settle the question whether the inam village constitutes a jagir within the meaning of the Act: A. I. R. 1926 Mad. 1167, Rel. on. (*Ramesam and Venkata Subba Rao, JJ.*) RAMALINGA MUDALIAR *v.* RAMASWAMI AIYAR. **119 I.C. 577=29 M.L.W. 760=1929 M.W.N.=239=A. I. R. 1929 Mad. 529.**

—S. 3 (2) (e)—Mokhasas.

———*If estates—Jurisdiction of Civil Courts.*

Mokhasas included in computing assets of zamindari in which they were situated at Permanent Settlement are permanent under-tenure of the zamindari and hence estates—Civil Courts have no jurisdiction to try suits by Mokasadars to eject their tenants. (*Spencer and Odgers, JJ.*) VEERASWAMI *v.* SEETHARAMA. **98 I.C. 65=A.I.R. 1926 Mad. 1089=51 M.L.J. 394.**

—S. 3 (2) (e)—Post-Settlement Inam.

———*Applicability of act.*

Where an inam subsequent to the settlement is held on a permanent under-tenure, the case falls under S. 3 (2) (e). (*Ramesam, J.*) BHUJANGA RAO *v.* PERIATHAMBI GOUNDAN. **92 I. C. 1047=A. I. R. 1926 Mad. 635.**

—S. 3 (3)—Holding.

———*Suit for partition—Jurisdiction of Civil Court.*

The Madras Estates Land Act provides for the grant of relief by way of ejectment only in respect of holdings. Hence where a suit is brought in a Civil Court for ascertainment by division of plaintiff's share of property held by himself and defendant in common and for ejectment of defendant from that share, the suit in so far as it is for partition is cognizable by the Civil Court and plaintiff should be allowed to withdraw his prayer for ejectment and to sue in the Civil Court. (*Oldfield and Ramesam, JJ.*) RAMAMURTHY *v.* BULLIRAJU. **68 I.C. 907=14 M.L.W. 500=A.I.R. 1921 Mad. 686=41 M. L. J. 431.**

—S. 3 (4)—Improvement—What is.

The real test of the improvement is the rise in value of the holding by reason of the improvement. It cannot be said that by having a few pits here and there in a field for the purpose of baling water the cost of digging which is not more than 8 annas the value of the holding has been enhanced : S. A. 571 of 1916, Diss. from. (*Devadoss and Wallace, JJ.*) VELLAYAPPA CHETTY *v.* SUBRAMANIAM CHETTIAR. **99 I.C. 559=50 Mad. 482=24 M.L.W. 803=1926 M.W.N 978=A.I.R. 1927 Mad. 137=51 M.L.J. 880.**

—S. 3 (4)—Fruit tree.

The cocoanut palm is not a fruit tree within the meaning of Cl. (f) of Sub S. 4 of S. 3. (*Devadoss and Wallace, JJ.*) VELLAYAPPA CHETTY *v.* SUBRAMANIAM CHETTIAR. **99 I.C. 559=50 Mad. 482=24 M.L.W. 803=1926 M.W.N. 978=A.I.R. 1927 Mad 137=51 M.L.J. 880.**

—S. 3 (5)—Estate.

———*Agraharam village—Shrotriem grant.*

In a grant of *an agraharam* village, the word "Shrotriem" was used. The *agraharamdars* were authorized to harvest and thrash the crops and appropriate the produce. There was no record of the actual cultivators of the land claiming permanent occupancy rights till about 1885 and it was clear that the claims were disputed when made. It was also clear that in many instances of fairly recent date, the *agraharamdars* were treating the land as their own, mortgaging it, selling it and letting it on terms quite inconsistent with any one else having permanent occupancy rights. *Held, shrotriem* grant may be either of land itself or of the revenue only. But in this particular case, the grant was grant of both the *Kudiwaram* and *Melvaram* and that consequently it is not an estate within the Act. (*Schwabe, C.J., Oldfield and Coutts-Trotter, JJ.*) P. SUBRAHMANYA *v.* T. SEETHAYYA. **70 I.C. 729=16 M.L.W. 462=31 M.L.T. 347=1922 M.W.N. 614=46 Mad. 92=A.I.R. 1923 Mad. 1 (F.B.)**

MAD.EST. LAND ACT. (1908) S. 3 (5)—Landholder.

—S. 3 (5)—Landholder.

The definition of "landholder" in S. 3 (5) is wide enough to include also the lessee from the owner or the landlord. (*Anantakrishna Ayyar, J.*) SUNDARAM AIYER *v.* KULATHU IYER. **123 I.C. 351=A.I.R. 1930 Mad. 61.**

Grantee of both varams of a post-settlement inam is a landholder : A.I.R. 1922 Mad. 373, (F.B.) Foll. (*Wallace, J.*) GANAPATI RAO *v.* SATTAMMA. **112 I.C. 400=A.I.R. 1928 Mad. 960.**

———*Post-settlement inam grant of portion of village—Status of grantee.*

Where Zamindar makes a post-settlement inam grant of a portion of village with both varams on a permanent kattubadi, the grantee is a landholder within the meaning of S. 3, Cl. (5). (*Sundaram Chetti, J.*) SURYANARAYAN *v.* BULLAYYA. **101 I.C. 85=25 M.L.W. 367=A.I.R. 1927 Mad. 568=52 M.L.J. 323**

———*Grant of inam comprising both varams—Status of grantee.*

Although the grant of a post-settlement inam comprises both the varams, the grantee is a land-holder and his ryot can claim occupancy rights, but where the grant is of kudivaram alone, he would be merely a ryot with the result that any under-tenant cannot claim rights of occupancy: A. I. R. 1922 Mad. 373 F. B.), Appl. (*Venkatasubba Rao and Madhavan Nair, JJ.*) SEETAYYA GARU *v.* APPADU. **92 I.C. 814=A.I.R. 1926 Mad. 526.**

———*Grant of darmilla inam—Status of grantee.*

In the case of darmilla inam, whether the grant was of both the warams or only melawaram, if on the grant the grantee becomes entitled to collect the rents of the land he would be a landholder within the meaning of Sub-Cl. (5) (*Srinivasa Aiyangar, J.*) G. MALLU NAYUDU *v.* G. CHINNA GANURU **86 I.C. 855=A. I.R. 1925 Mad. 1146.**

———*Transfer of melwaram to Kudivaramdar—Status of transferee.*

A person who owns the kudivaram already and to whom the melvaram right is subsequently transferred does not become a landholder and his suit for rent is maintainable in a Civil Court. 1922 Mad. 373 (F.B.) Dist. 39 M. L. J. 225 (F. B.) Foll. (*Krishnan and Odgers, JJ.*) MANIKYAMBA *v.* P. MALLAYA. **82 I.C. 929=20 M.L.W. 387=35 M. L. T. 70=47 Mad. 942=1924 M. W. N. 779=A.I.R. 1924 Mad. 782=47 M.L.J. 393.**

———*Grantee of Kudiwaram and portion of melwaram in a zamindari is not a landholder—Status of grantee.*

Where plaintiff claimed under a perpetual lease from the zamindar, of the kudiwaram rights and the

MAD. EST. LAND ACT, (1908) S. 3 (5)—Landholder Ex-owner.

zamindar also simultaneously parted with a part of his melwaram or landlord's share of the produce. It was held, that the grantee was not a land-holder, within the meaning of S. 3 (5). (*Spencer and Odgers, JJ.*) BHUPATIRAJU *v.* B. VENKATARATNAM. **70 I.C. 452=1921 M.W.N. 821= A.I.R. 1921 Mad. 629=41 M.L.J. 512.**

———*Ex-owner—Status of,*

A person who was owner of an estate on the date when his right to sue for arrears of rent accrued but on the date of filing his suit his interest in the land had been sold by auction. It was held that he is still a landholder within S. 3 (5). (*Wallis, C.J, Oldfield and Sadasiva Aiyar, JJ.*) VENKATA LAKSHMAMMA GARU *v.* CHINTAPALLI ACHIREDDI. **62 I. C. 890= 44 Mad. 433=13 M.L.W. 603=1921 M. W. N. 198= A. I. R. 1921 Mad. 152= 40 M.L.J. 319 (F.B.).**

———*Assignee of arrear of rent—Status of.*

Even a bare assignee of an arrear of rent from the owner of the estate or even a part thereof can be a landholder for the purpose of enabling him to pursue his remedies under the act as a "landholder". (*Wallis, C.J, Oldfield and Sadasiva Aiyar, JJ.*) VENKATA LAKSHMAMMA GARU *v.* CHINTAPALLI ACHIREDDI. **62 I.C. 890=44 Mad. 433= 13 M.L.W. 603=1921 M. W. N. 198= A.I.R. 1921 Mad. 152=40 M.L.J. 319 (F.B.).**

———*Bare declaration—Maintainability—Specific Relief Act, S. 42, Proviso.*

The Proviso to S. 42 does not apply to a suit to enforce a special statutory right of obtaining a declaration of plaintiff's status. The right of being recognised or nominated as a land-holder under the Madras Estates, Land Act (I of 1908) is such a right and a suit for a bare declaration is maintainable in respect of such right. (*Oldfield and Seshagiri Aiyar, JJ.*) VANISWAMI THEVAR *v.* CHELLASWAMI THEVAR. **62 I.C. 276=13 M.L.W. 104=1921 M.W.N. 193= A. I. R. 1921 Mad. 47.**

—S. 3 (5)—Landlord.

———*Grant of both warams—Status of grantee—Burden of proof.*

Where, in the inam made by the zemindar in 1838 both warams were granted, the inamdar would be a landholder within the meaning of the term used in S. 3 (5), and it is only if the inamdar could prove that kudivaram alone was granted to him that he could sustain his action against the cultivating tenant : A.I.R. 1922 Mad. 373, Foll. (*Devadoss, J.*) VENKATESAYYA *v.* PERUMAKKAL. **99 I.C. 592= A.I.R. 1927 Mad. 1180.**

—S. 3 (5)—Setting aside order under.

———*Limitation Act, Art. 14—Applicability of.*

S. 3 (5) suggests that the order of the Collector is a temporary one. No finality is given to the order in case a Civil Court does not settle the question. The Collector's decision will be *ipso facto* vacated whenever a Civil Court pronounces on the respective rights of the contending parties. Hence Art. 14 does not apply to a suit to set aside the order. (*Oldfield and Seshagiri Aiyar, JJ.*) VANNISAMI THEVAR *v.* CHELLASWAMI THEVAR. **62 I.C. 276=13 M.L.W. 104= 1921 M.W.N. 193=A.I.R. 1921 Mad. 47.**

—S. 3 (7)—Interpretation.

———*' Final decree '*

The final decree specified in S. 3 (7) means any decree in which the occupancy right has been and ought to have specifically in issue in the suit and has, therefore, been explicitly or implicitly decided in the suit in which the decree was passed. (*Wallace, J.*)

MAD. EST. LAND ACT, (1908) S. 3 (11)—Rent.

KOMURAJU NARASIMHAM *v.* KOLLI SOBHABADI. **101 I. C. 157= 25 M.L.W. 653= A.I.R. 1927 Mad. 610=52 M. L. J. 632.**

S. 3 (11)—Rent.

———*Agreement to pay for permission to build—Suit for Specific performance, if one for enforcement of patta.*

There is nothing in the Estates Land Act to prevent the landholder and the purchaser of a portion of the ryoti land in his estate from entering into a contract with each other that that land in future should be held or used not for agricultural purposes but for building purposes. The consideration for the land holder agreeing to the same may be either a lump payment made to him or annual payments. Such annual payments are not "rent" within the meaning of S. 3 (11) of the Estates Land Act, nor the persons agreeing to pay them ryots. A suit for specific performance of such a contract is not a suit to enforce acceptance of patta by a ryot within the meaning of S. 56 of the Estates Land Act and is, therefore maintainable in the Ordinary Civil Court. (*Wallace and Anantakrishna Aiyar, JJ.*) VENUGOPAL RICE MILL *v.* RAJAH OF PITTAPURAM. **53 Mad. 367= 59 M.L.J. 74.**

———*If includes compensation or damages.*

Though Cl. 11, S. 3 of the Act defining rent is not very explicit on the point of existence of agreement between landlord and tenant, having regard to the language employed and considering the whole of that clause, the expression " rent " must be regarded as having reference only to something that is payable not as compensation or damages but under or by virtue of a contract. (*Srinivasa Aiyangar, J.*) G. P. VENKATAYYA *v.* K. KISTAPPA. **111 I. C. 743= A.I.R. 1928 Mad. 340.**

———*Meaning of—Rent includes whatever is payable on any land.*

The definition of ' rent ' in S. 3 (11) includes whatever is payable not merely on ryoti land or old waste or *Kambattam* but on any land whatever. (*Phillips, J.*)TRUSTEE OF THE VIJIANAGARAM ESTATE *v.* PAILA ACHANAH. **91 I.C. 280=22 M.L.W. 522= 1925 M.W.N. 771= A.I.R. 1926 Mad. 140.**

———*Illegal cesses—Recovery of.*

Pagudi paid by kasavargam tenants is not rent and Revenue Court has no jurisdiction to entertain a suit for enforcement of pagudi. The mere fact that the tenants were paying illegal cesses or that a landlord was able to exact something from the tenants for a number of years would not give a right to the landlord to collect them . (*Devadoss, J.*) AYYASWAMI MOITHAI *v.* GOPALASWAMI CHETTY. **88 I.C. 380= A.I.R. 1925 Mad. 1087.**

———*Assessment of—Deduction of Kanganom.*

In assessing money rent in respect of a Shrotriem village where the ryots have occupancy holdings and have been paying warram for a very long time past, kanganom must not be deducted from the total outturn of the various fields. (*Abdur Rahim and Odgers, JJ.*) RANGACHARIAR *v.* DORAISAMI REDDY. **1921 M.W.N. 600=A.I.R. 1921 Mad. 689= 41 M.L.J. 332.**

———*Second crop—Liability of tenant—Burden of proof.*

The landlord is *prima facie* entitled to claim an additional rent from the tenant for a second *paddy* crop grown on his holding by the tenant with landlord's water, provided it is not against any established custom of the estate or express or implied contract between the parties. The burden of proving that

MAD. EST. LAND ACT, (1908) S. 3—Rent.

there is such an established usage or implied or express contract lies upon the tenants, 3 Mad. 1163, 10 Mad. 282 and 12 M. L. J. 22, Rel. on. (*Sadasiva Aiyar and Spencer, JJ.*) MIDNAPORE ZEMINDARY CO. LTD. *v.* MUTHAPPUDAYAN. **62 I. C. 337=44 Mad. 534=13 M. L. W. 387=A. I. R. 1921 Mad. 195=46 M. L. J. 213.**

———*Collecting and using rain water—Liability of tenant.*

A ryot who collects and uses for cultivation the rain-water falling on his own holding, by putting ridges all round his holding, is not using the landlord's water and is not bound to pay sarasari to the landlord: A. I. R. 1925 Mad. 620, Affirmed. (*Wallace and Madhavan Nair, JJ*). PRESIDENT TALUK BOARD, RAMNAD *v.* VAVARU AMBALAM. **95 I. C. 833=23 M. L. W. 591.**

—S. 3 (15)—Ryoti land—Test.

———*Conversion of, into homefarm or Kambattam.*

The test to decide whether lands leased are home farm or ryoti lands is whether the land was in actual cultivation of the Zemindar though he might let it out on lease for some reasons provided he had the ultimate intention of cultivating it. Ryoti land cannot be converted into home farm land by the Zemindar by any act of his unless it came within the special provisions laid down in this connection. He cannot, by merely treating it as homefarm land absorb it into the latter. Evidence of custom showing that certain land was treated as private land would not of itself determine the character of the land. Land let out for pasturage is not ryoti land within S. 3 (15) of the Act. (*Abdur Rahim and Burn, JJ.*) YARLAGADDA MALLIKARJUNA PRASADA NAIDU *v.* RENDUCHINTALA SUBBIAH. **61 I. C. 552=28 M.L.T. 281=39 M. L. J. 277.**

—S. 3 (16)—Ryoti land.

———*Inam grant—Resumption of inam—Effect of.*

Plaintiff granted melwaram of the suit land, which was ryoti land, as inam to the defendants' predecessors in lieu of service. Later on the plaintiff resumed the inam. The plaintiff then sued for arrears of rent on the land from the date of resumption. It was held that as the land was all along ryoti and was not in itself the inam, it is not excluded from the definition of ryoti land given in S. 3 (16) (c), (41 Mad. 554, Ref.) and hence the defendant was in possession of ryoti land all along and was not "admitted" to possession of it on the date of the resumption. (*Wallace and Thiruvenkatachariar, JJ.*) NARAYAN PATRUDU *v.* PEDDA MARANGI ESTATE. **109 I. C. 869=51 Mad. 228=27 M. L. W. 12=A. I. R. 1928 Mad. 170=54 M. L. J. 564.**

—S. 4—Alienee from pattadar—

———*Liability for rent.*

Although there is no priority of contract between the Zamindar and the alienee from the pattadar the former can sue the latter to recover rent. (*Jackson and Reilly, JJ.*) PARTHASARATHI APPA RAO *v.* MADDORI GANGAMMA. **1929 M.W.N. 141.**

—S. 4—Service land.

Section 4 does not include service land at all. (*Spencer and Odgers, JJ.*) VEERASWAMI *v.* SEETHARAMA. **98 I. C. 65=A. I. R. 1926 Mad. 1089=51 M. L. J. 394.**

—S. 5—Revenue.

———*Payment of revenue by a sharer—Right to contribution—Charge—Limitation Act, Art.* 132.

Where one of two or more co-sharers owningan estate subject to the payment of revenue to Government pays the whole revenue in order to save the estate, he is by the operation of law entitled to a charge upon the share of each of his co-sharers for the realisation of the latter's share of revenue and therefore a suit by him brought more than three years after the payment is not barred by limitation as it is a suit to enforce a charge and comes within the scope of Art. 132 of the Limitation Act, even where the case is governed by the Madras Estates Land Act. 26 Mad. 686 (F. B.) Foll. (*Phillips, J.*) NAGALA KOTTAYYA *v.* KOGANTI KOTAPPA. **90 I. C. 551=1925 M. W. N. 722=23 M. L. W. 178=A. I. R. 1926 Mad. 141=49 M. L. J. 517.**

MAD. EST. LAND ACT, (1908) S. 6—Lease before Act.

—S. 6—Applicability of.

———*Trespasser in possession.*

A person in possession as a mere trespasser cannot claim the benefit of S. 6. So a tenant whose holding was purchased by the landlord in execution of a rent decree but who continued in possession of the land and also did not pay rent or attorn to the landlord, cannot come under S. 6 or the explanation thereto. If any force is to be given to the phrase "having held land as a ryot", it must mean that a person whose interest in the land has continued till the commencement of the Act at least as a tenant at will and who is actually in possession at that date. (*Abdur Rahim and Oldfield, JJ.*) VENKATACHELLA NAIDU *v.* ETHIRAJAMMAL. **60 I. C. 192=44 Mad. 220=13 M. L. W. 61=1921 M. W. N. 189=A. I. R. 1921 Mad. 65.**

—S. 6—Intention.

S. 6 (2) is not intended in any way to govern the exception to S. 8 or to control its general language. (*Phillips, Krishnan and Ramesam, JJ.*) SUBBARAYUDU *v.* RAMASWAMI. **95 I. C. 92=49 Mad. 620=1926 M. W. N. 697=A. I. R. 1926 Mad. 661=50 M. L. J. 535.**

—S. 6—Izardar.

———*If occupancy ryot.*

The words "Izardar and farmer of rent" in sub-S. 1, S. 6 are not synonymous. They denote two classes of persons. If izardars and farmers of rent are raiyats at all, they are, as appears from S. 46, non-occupying ryots and cannot be converted into ryots with permanent right of occupancy. (*Lord Atkinson, J.*) SURISETTI BUTCHAYYA *v.* PARTHASARATHY APPA RAO. **69 I. C. 1=26 C. W. N. 785=30 M. L. T. 104=48 I. A. 387=44 Mad. 856=14 M. L. W. 168=A. I. R. 1922 P. C. 243=41 M. L. J. 669 (P.C.)**

—S. 6—Landholder.

———*Meaning of.*

The word "Landholder" in S. 6 (1) does not mean "landowner". It means a "landholder" as defined in S. 3 (5). (*Devadoss, J.*) KALLALAGAR DEVASTHANAM *v.* ANTHONY MOOPAN. **86 I. C. 191=A. I. R. 1925 Mad. 454=48 M. L. J. 147.**

—S. 6—Lease.

———*Of ryoti land by trustee—Status of tenant.*

Letting out ryoti land to a tenant is an act in the ordinary course of the management of the property belonging to the trust though the tenant by virtue of S. 6 acquires occupancy right therein. (*Devadoss, J.*). KALLALAGAR DEVASTHANAM *v.* ANTHONY MOOPAN. **86 I. C. 191=A. I. R. 1925 Mad. 454=48 M. L. J. 147.**

—S. 6—Lease before Act.

———*Dry pasture waste—Enhanced rent for cultivation—Nature of holding.*

The zamindar, before the Act had given the tenant a lease of certain lands. They were described as "dry

MAD. EST. LAND ACT, (1908) S. 6— Merger.

pasture waste." The lease contained a provision that if the lessee raised dry cultivation on the "dry pasture waste" he would have to pay rent on the land so cultivated at a higher rate. It was held that the lands should be included in the puttah as "cultivable" land and should remain part of the lessee's occupancy holding : 39 M. L. J. 277, Ref. *(Lord Blanesburgh.)* B. NAGANNA NAIDU *v.* V. PITCHAYYA.

119 I. C. 636=33 C. W. N. 1097=30 M.L.W. 435= 1929 M. W. N. 657=56 I. A. 346=50 C. L J. 493= 52 Mad. 797=A. I. R. 1929 (P.C.) 249= 57 M. L. J. 654.

—S. 6—Merger.

S. 8 must be read subject to the explanation in S. 6 so that a person owing an occupancy right already in the land does not lose it subsequently by getting the interest of the landholder. *(Krishnan and Odgers, JJ.)* MANIKYAMBA *v.* P. MALLAYA. **82 I.C. 929= 20 M.L.W. 387=35 M.L.T. 70=47 Mad. 942= 1924 M.W.N. 779=A.I.R. 1924 Mad. 782= 47 M.L.J. 393.**

—S. 6—Possession before and after Act.

———*Payment of rent—Land not private land—Proof of occupancy right.*

Where it was found on evidence that the suit land was not the private land of the zamindar at the time of the grant, but must have been only ryoti land and that the defendants had been in possession of the suit land for several years both before, and after the passing of the Estates Land Act, paying rent to the inamdars it was,

Held that the defendants must be deemed to be ryots in possession of ryoti land in the estate of the land-holder within the meaning of S. 6 and they must be taken to have acquired permanent rights of occupancy in the suit land by virtue of the statutory provision in S. 6. *(Sundaram Chetty, J.)* SURYANARAYANA v. BULLAYYA. **101 I.C. 35=25 M.L.W. 367= A.I.R. 1927 Mad. 568=52 M.L.J. 323.**

—S. 6—Right of Occupancy.

———*Acquisition by prescription.*

Where defendants were in possession from 1829 selling, mortgaging, partitioning and receiving compensation for lands acquired by Government it was held that they had acquired occupancy right by prescription. *(Mr. Ameer Ali.)* CHIDAMBARA SIVAPRAKASA *v.* VEERAMA REDDI. **68 I.C. 538= 45 Mad. 586=16 M. L. W. 102= 31 M.L.T. 54=49 I.A. 286= 1922 M.W.N. 749=37 C.L.J. 199=27 C.W.N. 245= A.I.R. 1922 P. C. 292=43 M.L.J. 640.**

—S. 6—Waste land.

———*Grant of—If estate.*

Where a grant of lands in lieu of a money payment comprised a small portion of lands under cultivation and a large extent of waste land ; and the cultivation was not found to be a permanent one: it was,

Held that the grant was not of an estate and therefore S. 6 did not apply. *(Devadoss, J.)* THIRUPUTHI GOUNDAN *v.* SHAMANNA GOUNDAN. **86 I.C. 182. 21 M.L.W. 118=A.I.R. 1925 Mad. 477= 48 M.L.J. 654.**

—S. 6—Yearly tenant.

———*Kamatam land—Acquisition of occupancy right.*

Yearly tenants paying *waram* cannot convert themselves into permanent occupancy ryots by mere assertion that they held the land under such a right. Occupancy right cannot be acquired in respect of *kamatam* land by virtue of Section 6 of the Act. *(Krishnan, J).* PALANI NAYAKKAN *v.* PARVATI AMMAL. **82 I.C. 597=A.I.R. 1925 Mad. 291.**

MAD. EST. LAND ACT, (1908) S. 8—Relinquishment by tenant.

—S. 8—'Acquired'—Meaning of.

The word "acquired" in the exception to S. 8, covers a case of "surrender". *(Phillips, Krishnan and Ramesam, JJ.)* SUBBARAYUDU *v.* RAMASWAMI. **95 I.C. 92=49 Mad. 620=1926 M.W.N. 697= A.I.R. 1926 Mad. 661=50 M.L.J. 535 (F.B.).**

—S. 8—Applicability.

Nawab of Carnatic granting village to lady of his family—Grant if jagir—Village again purchased by Nawab and mortgaged to another—Mortgagee at first not possessing kudivaram but subsequently acquiring mirasi rights and also kudivaram character of property.

Two villages in the District of Chingleput were granted by the Nawab of Carnatic to a lady of his family. The villages were purchased by the Nawab and were then mortgaged by him and the mortgage was never redeemed. The mortgage was executed when the Nawab was still sovereign of the Carnatic. At first the mortgagee did not possess the kudivaram rights in the village, but afterwards he acquired the mirasidar rights and became entitled to the kudivaram also in respect of the suit plots in the villages. It was held that inasmuch as the original grant was to the lady of the family it was not a jagir within the meaning of Cl. (c) but was an inam within the meaning of Cl. (d), because the grant having been made by a sovereign authority must be taken to have been recognized by the British Government under Regn. 31 of 1802. And so it was an estate within the meaning of the Act. But since the mortgagee, inamdar, subsequently acquired the mirasi rights and became entitled to the kudivaram in the suit plots, the plots would be covered by the exception to S. 8 and so would not be governed by the Estates Land Act and so a civil Court had jurisdiction to try the suit : 40 Mad. 654, Ref. *(Ramesam and Venkatasubba Rao, JJ.)* RAMALINGA MUDALI *v.* T. S. RAMASAMI AYYAR. **119 I.C. 577=29 M.L.W. 760=1929 M.W.N. 239= A.I.R. 1929 Mad. 529.**

—S. 8—Melvaram and Kudivaram—

———*Grant to one person—Land if estate.*

Where it was found that the melvaram and the kudivaram interests in the lands of the village of Mangal were at some time before 1723 granted by a Raja of Tanjore, and regranted in 1723 by the then Raja of Tanjore, to the Temple it was held that the lands in suit are not an "estate" within the meaning of Act I of 1908. *(Sir John Edge.)* A. S. N. NAINAPILLAI MARAKAYAR *v.* T. A. R. A. RM. RAMANATHAN CHETTIAR. **82 I.C. 226=5 L.R.P.C. 33= 19 M.L.W. 259=22 A.L.J. 130=51 I.A. 83= 34 M.L.T. 10=1924 M.W.N. 293=47 Mad. 337= 28 C.W.N. 809=A.I.R. 1924 P.C. 65=46 M.L.J. 546.**

—S. 8—Merger—Interpretation—Effect.

Under S. 8 (3) the merger cannot convert ryoti into private land. It does not preclude conversion by acts subsequent to the merger. The words "before or after the commencement of this Act" in Cl. 1, should be read as part and parcel of Cl. 3.

The words "merger of the occupancy right under sub-S. 1" in Cl. 3 can be given full effect by interpreting merger" in that clause as meaning merger resulting from a union by transfer, succession or otherwise as mentioned in Cl. 1. *(Krishnan and Venkatasubba Rao, JJ.)* VEERABHADRAYYA *v.* NAGANNA NAIDU. **98 I.C. 828=50 Mad. 201= 24 M.L.W. 579=1926 M.W.N. 869= A.I.R. 1927 Mad. 41=52 M.L.J. 38.**

—S.8—Relinquishment by tenant.

———*Relinquishment by tenant*—Ryoti *land*—

MAD. EST. LAND ACT, (1908) S. 8—Retrospective Effect.

Mortgage to third party and then relinquishment to landlord—Validity of relinquishment—Mortgage if extinguished.

A tenant holding *ryoti* land in an Estate mortgaged it to a third party and then relinquished it. The relinquishment was not by means of a writing in the presence of witnesses as provided for in the proviso to S. 12 of the Rent Recovery Act but was accepted by the *zamindar* and acted on by him and by the tenant and his co-parceners. From 1897 to 1905 the land was cultivated by persons to whom it was leased by the *zamindar* as *Kamatam*, and in 1905 by the *zamindar* himself as privateland it was held that there was a valid relinquishment but that on relinquishment the *Kudivaram* right did not vest in the landlord in such a manner as necessarily to convert the land into private land. The mortgage subsisted in favour of the mortgagee after the date of and notwithstanding the relinquishment.

Per *Napier, J.*—On relinquishment the *Kudivaram* right in the land was in abeyance, until it came into existence again by admission of a new *ryot* and continued in abeyance, as long as the landlord did and could in accordance with law treat the land as private land. *(Sadasiva Aiyar and Napier, JJ.)* RAJA VENKATA RAMIAH *v.* LANKA LAKSHMINARAYANA.
66 I.C. 376=45 Mad. 39=30 M.L.T. 188=15 M.L.W. 218=1921 M.W.N. 615=A.I.R. 1922 Mad. 281=42 M.L.J. 161.

—S. 6—Retrospective effect.

The Act does not retrospectively forbid conversion of ryoti into private land : 39 Mad. 341 and A. I. R. 1922 Mad. 241, Rel. on. *(Krishnan and Venkatasubba Rao, JJ.)* VEERABHADRAYYA *v.* NAGANNA NAIDU. **98 I. C. 828=50 Mad. 201=24 M.L.W. 579=1926 M.W.N. 869=A.I.R. 1927 Mad. 41=52 M.L.J. 38.**

—S. 8—Scope.

——Acquisition of—Landholder's interest—Effect on occupancy right.

S. 8 must be read subject to the explanation in S. 6 so that a person owing an occupancy right already in the land does not lose it subsequently by getting the interest of the landholder. *(Krishnan and Odgers, JJ.)* GANJAIN MANIKYAMBA *v.* PASALA MALLAYYA. **82 I. C. 929=20 M. L. W. 387=35 M. L. T. 70=47 Mad. 942=1924 M. W. N. 779=A. I. R. 1924 Mad. 782=47 M. L. J. 393.**

—S. 6—Surrender & abandonment.

The two modes of obtaining the kudivaram right, namely by surrender or abandonment, stand on the same footing. *(Phillips, Krishnan and Ramesam, JJ.)* SUBBARAYUDU *v.* RAMASWAMI. **95 I. C. 92=49 Mad. 620=1926 M. W. N. 697=A. I. R. 1926 Mad. 661=50 M. L. J. 535.**

—S. 12—Applicability.

——Separate lease of trees.

If the trees are held on what may be called separate title, *i.e.*, on a separate lease of trees as trees, S. 12 does not apply : [1 M. L. W. 881 Appr.] If in such a case the trees are wrongfully cut, the full value of the trees must be paid. *(Lord Dunedin.)* SETUPATI AVERGAL *v.* KAMID ROWTHEN. **94 I. C. 322=49 Mad. 335=53 I. A. 74=1926 M. W. N. 376=24 M. L. W. 1=30 C. W. N. 844=A. I. R. 1926 P. C. 22=50 M. L. J. 503. (P. C.)**

—S. 12—Applicability to tree

——Holding—Occupancy holding—Purchase by landlord—Character if changed.

A holding, to which the incident of the right of occupancy is attached, does not become a home-farm land, merely by the fact that the landlord buys it, at a Court auction or at a private sale. If it is a ryoti land it can never become home-farm, by the landlord buying it, at a Court auction, or otherwise. In ordinary cases, unless there be a custom or contract to the contrary, the occupancy tenant would be entitled to the trees in his holding ; but where a custom exists by which the trees on the land could be held, apart from the land itself, the provisions of S. 12 of the Estates Land Act do not apply. *(Devadoss, J.)* SOUNDARARAJU MUDALIAR *v.* VENKOBA RAO. **86 I. C. 206=21 M. L. W. 134=A. I. R. 1925 Mad. 490.**

—S. 12—Rent for trees.

——Calculation of

Where it was agreed in the muchilika that what the occupancy tenant was to pay to the landlord, except for the areas on which crops were raised, was to vary with the number of mature trees, it was held that such method of calculating rent for the land is permissible under the Estates Land Act : A. I. R. 1926 P. C. 22, Rel. on. *(Reilly, J.)* PALANIAPPA *v.* RAJA OF RAMNAD. **113 I. C. 559=A. I. R. 1928 Mad. 1254.**

——Trees—Right of ryot to—Rent varying with the number of trees—Effect of.

Under S. 12 of the Madras Estates Land Act, an occupancy ryot is entitled to use, enjoy and cut down trees in his holding and such right includes the right to appropriate the trees cut down. Where the land itself on which the trees stand is held on patta the fact that the rent payable for the land varies with the number of trees standing on it does take the case out of the operation of the Estates Land Act. 1 L. W. 881 Dist. There is no valid oustom in the Ramnad Zemindari entitling the landholder to claim compensation for Palmyra Trees cut by the ryots without the permission of the landholder. *(Sadasiva Iyer and Spencer, JJ.)* RAJA OF RAMNAD *v.* KAMITH RAVUTHAN. **60 I. C. 90=12 M.L.W. 465.**

—S. 12—Reservation.

——For trees—Period of operation.

Section 12 makes no distinction in the result between a reservation made by custom and one made by contract. In each case the reservation, when not qualified, will be operative for precisely the same period of time. The true conclusion therefore is that where the reservation as to trees, however, constituted is conterminous with the previously limited possession, it remains, except with regard to trees subsequently planted by the ryots or naturally grown upon the holding, operative throughout the occupancy made permanent by the Act. *(Lord Blanesburgh).* B. NAGANNA NAIDU *v.* PITCHAYYA. **119 I.C. 636=33 C.W.N. 1097=30 M.L.W. 435=1929 M.W.N. 657=56 I. A. 346=50 C.L.J. 493=52 Mad. 797=A.I.R. 1929 P.C. 249=57 M.L.J. 654.**

—S. 12—Right to Trees.

Where the Zamindar has parted with occupancy rights he must prove that under S. 12 he is entitled to the trees. *(Curgenven, J.)* ZAMINDAR OF BODOKIMIDY *v.* BUDANKAYALA BHIMAYYA. **98 I.C.800=24 M.L.W. 677=A.I.R. 1927 Mad. 76.**

—S. 13—Contract before Act.

——Improvement after Act—Contract if enforceable.

Where the plaintiff claims that he is entitled to get wet rates from his tenant the defendant, on the strength of a contract entered into before the Estates Land Act (I of 1908) was passed and the improvement was made after it was passed it was held, that the plaintiff is not entitled to rely on his contract in view

MAD. EST. LAND ACT, (1908) S. 13—Contract before Act.

MAD. EST. LAND ACT, (1908) S. 13—Double Crops.
of S. 13 (3) of the Act read with S. 187 (1).
(*Schwabe, C. J., Oldfield and Coutts-Trotter, JJ.*) CHOCKALINGA *v.* PALANI AMBALAM. **73 I.C. 926= 46 Mad. 712=18 M.L.W. 646=32 M.L.T. 377= 1923 M.W.N. 411=A.I.R. 1923 Mad. 685= 45 M.L.J. 124.**

—S. 13—Double Crops.
———*Use of Tenants' well water—Liability for enhanced rent.*

As regards the 2nd crop on lands raised by the tenants with the aid of their own well water without taking the landholder's water. *Held*, that section 13 (3) does not apply as it cannot be said any higher rate of rent is being claimed on account of increased production in consequence of the tenants' improvements. Under the waram system the landholder is entitled to a share in all the produce of the land unless there is a special contract to the contrary exempting any particular crop and his claim to share in all the crops cannot be looked upon as an enhancement of rent. (*Spencer and Krishnan, JJ.*) VARADA REDDI *v.* SRINIVASA MUDALIAR. **72 I.C. 683= 18 M.L.W. 169=33 M.L.T. 34=1923 M.W.N. 357= A.I.R. 1924 Mad. 299=45 M.L.J. 199.**

—S. 18—Suits for rent.
———*Kambattam land—Jurisdiction of Revenue Court.*

Under S. 19, a Revenue Court is debarred from trying a suit for rent on *Kambattam* land, but all other suits by a landholder for recovery of rent seem to be covered by Art. 8 of the Schedule, Part A. (*Phillips, J.*) TRUSTEES OF THE VIZYANAGARAM ESTATE *v.* PAILA ACHANAH. **91 I.C. 280= 22 M.L.W. 522=1925 M.W.N. 771= A.I.R. 1926 Mad. 140.**

—S. 24—Enhancement, what is.
———*Ryot using water of Government tank—Government recovering money therefor from landlord—Landlord's claim to recover it from tenant if one for enhancement of rent within S. 24.* (*Per Ramesam and Wallace, JJ.*, Contra *Jackson, J.*)

When a ryot uses, for the cultivation of a land in his holding, water from a Government tank and for the use of such water so taken the Government recovers an amount as and by way of water-cess from the landholder, the claim of the landholder to recover such amount from the ryot is not a claim for an enhancement of rent within the meaning of S. 24 Madras Estates Land Act: 33 M.L.J. 355, Rel. on (*Ramesam, Wallace and Jackson, JJ.*) DURAISWAMI GURUKKAL *v.* SUBRAMANIA GURUKKAL. **108 I.C. 625=51 Mad. 266=27 M.L.W. 376= A.I.R. 1928 Mad. 419=54 M.L.J. 361 (F. B.)**

—S. 24—Suit for Enhancement.

A suit by the landholder against the ryot for enhanced rent based upon a contract between the parties is barred by S. 24. (*Devadoss, J.*) VENKATARAMANACHAR *v.* VALAI IBRAHIM SAHIB. **83 I.C. 130=20 M.L.W. 582= 1924 M.W.N. 897=A.I.R. 1924 Mad. 897.**

—S. 25—Customary right.
———*Admission to possession of ryoti lands—Usufructuary mortgagee continuing possession under a Kadappa.*

Where a usufructuary mortgagee of lands in an estate was allowed to continue in possession under a Kadappa after the discharge of his mortgage, *held*, he was not admitted to possession of ryoti lands within S. 25 of the Act and he was bound by the terms of the Kadappa and cannot claim to be liable only for the customary rent. (*Abdur Rahim and Oldfield, JJ.*) SIR RAJENDRAMANI DEVI GARU *v.* YELLAPPARAMA NAIDU. **60 I. C. 15=12 M.L.W. 600=39 M.L.J. 565.**

—S. 26—Banjar lands.
———*If ryoti—Extra payment—If enhancement.*

If lands were originally Banjar lands let for the purposes of grazing, the grazing fees charged is not rent and the lands are not ryoti lands. If extra payment is claimed for additional advantages, it would not be enhancement of rent and neither S. 26 nor S. 30 would apply: 38 Mad. 738; 31 M.L.J. 214; and 33 M.L.J. 355; Foll. (*Kumaraswami Sastri and Reilly, JJ.*) YELLAMARTY RAMANNA *v.* S. APPA RAO. **115 I.C. 337=A.I.R. 1929 Mad. 75.**

—S. 26—Receiver—Right to rent.

Where a Court has granted permission to the receiver under O. 40, R. 1 (1) (d), Civil P.C., to file suits for the enforcement of pattas and also dismissed the application subsequently filed by the ryots to cancel the order granting the said permission for the institution of these suits, the receiver is a person entitled to the rent within the provisions of Sub-S. (3), S. 26, having regard to the definition of "landholder" in S. 3 (5); A.I.R. 1921 Mad. 314, Dist. (*Waller and Anantakrishna Ayyar, JJ.*) MUTHU VIRA REDDI *v.* MAYANDI. **120 I.C. 563=52 Mad. 967= 30 M.L.W. 713=1929 M.W.N. 739= A.I.R. 1930 Mad. 67=57 M.L.J. 668.**

—S. 26—Right to enhancement.
———*Rent lower than in the neighbourhood.*

If on the ryoti lands the rents charged are lower than the lawful rate of rent payable upon land of similar description and with similar advantages in the neighbourhood, and if the prior landlord has not consented to the lower rent for any of the reasons specified in S. 26 (1), the landlord is entitled to enhance the rent under S. 26 (3), and need not proceed under S. 30: 7 L. W. 377 and A.I.R. 1923 Mad. 306, Rel. on. (*Kumaraswamy Sastri and Reilly, JJ.*) Y. RAMANNA *v.* S. APPA RAO. **115 I.C. 337=A.I.R. 1929 Mad. 75.**

—S. 26—Scope.
———*Tenant paying lesser rent from inception under agreement—If affected by S. 26.*

Section 26 deals with cases where there has been actual prior rent greater than the rent claimed by the tenant and does not deal with a case where a ryot is setting up that *ab initio* the rent payable was the lower rent and setting up that the terms of tenancy always had been the lower rent but to be increased to the higher rent in certain eventualities. The lawful rent payable is not necessarily or invariably the faisal rate fixed by Government but may be a contract rate on which the occupancy is based. This is a matter which has to be proved. (*Schwabe, C. J., and Wallace, J.*) PARA DEKKAN *v.* AMEERUDDIN. **72 I.C. 131=17 M.L.W. 169= A.I.R. 1923 Mad. 306.**

—S. 26—Waste land, Meaning of.

The question whether a piece of land is waste land or not must depend upon the circumstances of each case and the evidence given in it. In order to be described as "waste land," the land need not necessarily be immemorial waste land; but if it has never been cultivated, or at any rate has not been cultivated for a long period, it will come within the meaning of the term "waste land" used in the section: A. I. R. 1926 Mad. 193, Affirmed. (*Waller and Madhavan Nair, JJ.*) CHINNATHORAI PILLAI *v.* GOVINDA RAO. **104 I. C. 125=26 M. L. W. 245= 1927 M.W.N. 316=A.I.R. 1927 Mad. 850= 53 M. L. J. 306.**

—S. 26—Waste land.
———*'Bringing into cultivation'—Meaning of.*

MAD. EST. LAND ACT, (1908) S. 27—Extent of holding.

"Bringing into cultivation" within S. 26 means cultivating land which had not previously been cultivated or at any rate had not been cultivated for a long period. The mere fact that land lies fallow for one, two or even four years cannot constitute it as waste land. (*Phillips, J.*) GOVINDA ROW *v.* CHINNATHURAI PILLAI. **91 I. C. 377 = 1925 M.W.N. 871 = 24 M.L.W. 329 = A.I.R. 1926 Mad. 193 = 49 M.L.J. 649 =**

—S. 27—Extent of holding—Burden of Proof—Patta.

Where the patta for a particular fasli shows a holding to be of a particular extent, the presumption under S. 27 is that the holding was held in subsequent faslies on the same conditions and it is for the party alleging change in the extent to prove it. (*Spencer, J.*) D. K. SYED IBRAHIM SAHI *v.* K. KRISHNASWAMI NAICKER. **97 I.C. 153 = 24 M. L. W. 161.**

—S. 27—Conditions of tenancy—Presumption.

By S. 27 a rule of presumption is enacted and the Courts are entitled to presume that the conditions of tenancy for a particular year continue to be in force in the year immediately following. But under S. 52 it is not merely a question of presumption, for the section enacts that pattas "shall" remain in force. *(Anantakrishna Ayyar, J.)* SUNDARAM AYER *v.* KULATHU IYER. **123 I.C. 351 = A.I.R. 1930 Mad. 61.**

—S. 27—Rent.

———*Relief in respect of land left fallow—Condition—Custom.*

The custom to relieve the tenant of rent in respect of land allowed to lie fallow is one of the conditions under which the raiyat holds his land within the meaning of S. 27 and the operation of S. 4 is restricted to the extent to which the tenant by the custom is relieved of his rent. *(Lord Tomlin.)* RAJA OF RAMNAD *v.* MANGALAM. **A. I. R. 1930 P. C. 234.**

—S. 30—Applicability.

———*Rent lower than in the neighbourhood—Right to enhancement.*

If on the ryoti lands the rents charged are lower than the lawful rate of rent payable upon land of similar description and with similar advantages in the neighbourhood, and if the prior landlord has not consented to the lower rent for any of the reasons specified in S. 26 (1), the landlord is entitled to enhance the rent under S. 26 (3), and need not proceed under S. 30 : 7 L. W. 377 and A. I. R. 1923 Mad. 306, Rel. on. *(Kumaraswami Sastri and Reilly, JJ.)* YELAMARTY RAMANNA *v.* SOBHANADRI APPA RAO. **115 I. C. 337 = A. I. R. 1929 Mad. 75.**

———*Nature of enhancement.*

S. 30 applies only to enhancements which might be regarded as permanent at the time of the application, that is, as continuously operating in the future as far as one can see until some new circumstances arise which require another enhancement or reduction, but not to cases where it is known that the conditions may be constantly fluctuating. (*Ramesam, Wallace and Jackson, JJ.*) DURAISWAMI GURUKKAL *v.* SUBRAMANIA GURUKKAL. **108 I. C. 625 = 51 Mad. 266 = 27 M. L. W. 376 = A. I. R. 1928 Mad. 419 = 54 M. L. J. 361.**

—S. 40—Rent—Basis of Calculation.

———*Cash payment for 10 years.*

Where in the 10 years previous to the suit under S. 40, the ryot has made cash payment, such cash payment must be duly considered as one of the facts while making the calculation but at the same time it cannot be treated as the only fact on which the calculation should be based. (*Jackson and Reilly, JJ.*) PAKHI-

MAD. EST. LAND ACT, (1908) S. 42—Suit for Additional rent.

MUTHU NADAR *v.* R. KANAGASABAPATHY CHETTIAR. **117 I. C. 134 = A. I. R. 1929 Mad. 523.**

———*Rent paid by ryots in neighbourhood.*

Clause 3 (b) means that if for neighbouring occupancy ryots a regular money rent has been fixed, that rent shall be taken into consideration while making the calculation, but it has no reference to payments made by the neighbouring ryots under temporary leases such as kattukuthagai leases. (*Jackson and Reilly, JJ.*) PAKHIMUTHU NADAR *v.* R. KANAGASABAPATHY CHETTIAR. **117 I. C. 134 = A. I. R. 1929 Mad. 523.**

—S. 40—Rent—Commutation of.

———*Fixing time of commencement—No notice to parties—Legality of.*

The determination as to the time from which the commutation allowed under S. 40 is to take effect is a judicial decision and no Court is justified in adding a note to a judgment as regards an important question which has to be decided in the presence of the parties and after taking such evidence as they may adduce. *(Devadoss, J.)* KOOTHANAINAR PILLAI *v.* MADAPPA KONE. **113 I.C. 60 = 1928 M.W.N. 839 = A.I.R. 1929 Mad. 49**

—S. 40—Rent—Mode of Calculation.

———*Exclusion of abnormal years.*

There is nothing wrong if the Deputy Collector, while making the calculation, instead of taking the ten years as they stand and then making such modifications as the circumstances of each year demand, begins with excluding certain years from the 10 years' average struck under S. 40 (3) (a), because the prices in those years were abnormal : A. I. R. 1926 Mad. 760, Foll. (*Jackson and Reilly, JJ.*) PAKHIMUTHU NADAR *v.* R. KANAGASABAPATHY CHETTIAR. **117 I. C. 134 = A. I. R. 1929 Mad. 523.**

—S. 40 Rent—Preceding ten years—Meaning of.

"Preceding ten years" in Cl. (a) of S. 40 (3) means the ten years preceding the year in which the Collector determines the amount of the commuted rent and not the ten years preceding the year in which the suit is instituted. The "ten years" refer to the preceding ten years other than the years which the Local Government may notify to be or to have been famine years, thus excluding from the ten years any years which may have been so notified. The exclusion of any year or years from the ten years' period does not mean that the statutory term is thereby extended.

In settling fair and equitable rent under S. 168 (2) the average of ten years is only to form one of the considerations for the fixing of commuted rent, and the Court is at liberty to take other facts also into consideration where the circumstances are peculiar, such as where some of the ten years are extraordinary years. *(Waller and Madhavan Nair, JJ.)* RAMAYYA *v.* ZAMINDAR OF MANDASA. **95 I.C. 963 = 1926 M.W.N. 351 = A.I.R. 1926 Mad. 760.**

—S. 42—Suit for additional rent.

———*For excess land occupied—Jurisdiction.*

A suit, not for ejectment, but for arrears of rent due on the ground that the tenant was enjoying more extent than was agreed on and that the rent on the excess was not included in the actual rent he paid, is a suit for additional rent for land proved to be in excess of the area for which rent has been previously paid by him within the meaning of S. 42 of the Estates Land Act, 1908, and must be filed before the Collector and cannot be treated as a suit for damages for use and occupation. (*Wallace, J.*) SRI SRI SRI

MAD. EST. LAND ACT, (1908) S.42—Procedure.
GAJAPATI KRISHNACHANDRA DEO v. APPANNA SAARABK 1930 M. W. N. 205.

—S. 42—Procedure.
Section 147 in terms applies to proceedings under S. 42. *(Wallace and Srinivasa Ayyangar, JJ.)* (METUKAR SUBBA REDDY *v.* DAMAVARAPU VENKATA SUBBA REDDY. **110 I.C. 539=51 Mad. 755=28 M.L.W. 558=A.I.R. 1928 Mad. 519=55 M.L.J. 72.**

—S. 42—Revision.
Board of Revenue and High Court can entertain Revision application from an Order dismissing an Appeal against the Order of Revenue Divisional Officer on application for enhancement. *(Kumarasami Sastri, J.)* GOPALA MANNADIAR *v.* PALANI GOUNDAN. **96 I.C. 768=1925 M.W.N. 489.**

—S. 45—Sivoyjama patta.
——Effect of.
The effect of issuing a sivoyjama patta is not to recognize grantee as a ryot but only to collect some amount from him for his occupation within the meaning of S. 45, and therefore, a holder of such patta cannot claim possession against a person expressly introduced by proprietor as a ryot. Even as against the proprietor his possession is no more than that of a trespasser. *(Ramesam, J.)* DORAISWAMI NAIDU *v.* SYED MIR HUSSAIN. **91 I.C. 767=24 M.L.W. 326=1926 M.W.N. 624= A.I.R. 1926 Mad. 975.**

—S. 45—Suit for Mesne profits—Procedure.
A land-holder desiring to recover mesne profits as damages from a trespasser must first apply to Collector under S. 45 to get the amount of the latter determined and then sue in civil Court under S. 163. *(Ayling and Odgers, JJ).* KOTIKALAPUDI KATTAYYA *v.* RANGIAH VENKATU RAMAYA APPA RAO BAHADUR. **60 I.C. 32=12 L.W. 673=28 M.L.T. 279=1920 M.W.N. 702=39 M.L.J. 571.**

—S. 46—Application under.
——If lies to receiver.
An application under S. 46 cannot be made to a Receiver in charge of an estate. *(Abdur Rahim and Odgers, JJ.)* SWAMINATHA ODAYAR *v* SUNDARAM AIYAR. **60 I. C. 18=44 Mad. 274=A. I. R. 1921 Mad. 314=39 M.L.J. 711.**

—S. 46—Occupancy right.
——Acquisition of—Landholder and Owner.
In order to enable a ryot to get occupancy right under section 46 the act must be the act of the landholder who is also the owner of the estate, though under the definition of the term "landholder" one need not be the owner of the estate in order to be landholder as in section 3. *(Devadoss, J.)* NALLAKAKKAN AMBALAM *v.* SRI KALLALAGAR DEVASTHANAM. **91 I. C. 319=22 M. L. W. 622=1925 M. W. N. 865=A. I. R. 1926 Mad. 156=49 M. L. J. 628.**

—S. 51—Patta.
——Extract under R. 25.
An extract given under R. 25 of the rules framed under the Act by the Settlement Officer would not be a patta complying with the requirements of S. 51. *(Kumaraswami Sastri and Reilly, JJ.)* RAJA OF MANDASA *v.* JAGANNAIKULU. **112 I. C. 176=28 M. L. W. 515=1928 M. W. N. 530=A. I. R. 1928 Mad. 1103=56 M. L. J. 81.**

—S. 52—Construction of contract.
——Rokkam rates fixed by contract—Contract providing for revision to waram rates—Effect of.
Where the muchilikas executed by tenants for the period 1314 to 1323 Fasli contain a provision by which after the expiry of the period fixed under it the ryots undertake to cultivate the land under "pathukattu muchilikas according to the Amani Rules." It has been *held*, that the ryots agreed to revert to the waram system after the period fixed in the contracts and therefore it is not necessary for the landholder to rely on the first part of cl. 3, S. 52 to regulate his relationship with his tenants for Fasli 1324 and thereafter, the contract in the muchilika itself regulating it. *(Spencer and Krishnan, JJ.)* VARADA REDDI v. SRINIVASA MUDALIAR. **72 I. C. 683=18 M. L. W. 169=33 M. L. T. 34=1923 M. W. N. 357=A. I. R. 1924 Mad. 299=45 M. L. J. 199.**

—S. 52—Exchange of patta—Continuance—Presumption.
In cases where the landholder exchanges patta for one fasli, the same will be deemed to be in force in the succeeding fasli under S. 52 (3); he cannot evade the applicability of S. 52 (3) by giving a lease and putting the lessee in a position to exchange pattas. Where, therefore, a landlord, having granted a lease for a term of years, places the lessee in the position of the landholder, and the patta is tendered by the lessee in the usual Court it shall have the same force as if the same is tendered by the landholder himself: A. I. R. 1922 P. C. 257, Ref. *(Anantakrishna Ayyar, J.)* SUNDARAM AYER *v.* KULATHU IYER. **123 I. C. 351=A. I. R. 1930 Mad. 61.**

—S. 52—Leave 'to appeal.'
——Civil P. C. S. 109 (c)—'Decreed'—Meaning of.
The contention that 'decreed' in S. 52 (3) of the Madras Estates Land Act (1908) means decreed under that Act, and that no former decree could have any operation, is not of sufficient weight to justify granting leave to appeal. *(Lord Buckmaster.)* RADHAKRISHNA AIYAR *v.* SWAMINATH AIYAR. **60 I. C. 85=48 I. A. 31=44 Mad. 293=19 A. L. J. 161=23 Bom. L. R. 718=33 C. L. J. 277=25 C. W N. 630=13 M. L. W. 321=1921 M. W. N. 119=29 M. L. T. 418=A. I. R. 1921 P. C. 25=40 M. L. J. 229.**

—S 52—Presumption.
——Conditions of tenancy—Continuance.
By S. 27 a rule of presumption is enacted and the Courts are entitled to presume that the conditions of tenancy for a particular year continue to be in force in the year immediately following. But under S. 52 it is not merely a question of presumption, for the section enacts that pattas "shall" remain in force. *(Anantakrishna Ayyar, J.)* SUNDARAM AYER *v.* KULATHU IYER. **123 I. C. 351=A. I. R. 1930 Mad. 61.**

—S. 52—Scope.
——Rent decree—Res-Judicata—C. P. C., S. 11.
The doctrine of *res-judicata* is not a question but the application of the special rule stated in S. 52 (3), Madras Estates Land Act under which *Muchilikas* decreed for any revenue year remain in force, until the beginning of the year for which fresh ones are exchanged or decreed, and there is no reason for restricting the scope of the general reference to *muchilikas* decreed to those decreed by any particular description of Court. *(Lord Shaw.)* RADHA KRISHNA AYYAR *v.* SUNDERSWAMY IYER. **74 I. C. 584=16 M. L. W. 18=45 Mad. 475=31 M. L. T. 31=49 I. A. 211=27 C. W. N. 1=20 A. L. J. 937=36 C. L. J. 450=A. I. R. 1922 P. C. 257=43 M. L. J. 323 (P.C.)**

—S. 53—Condition precedent.
——Proceedings under Chap. VI—Tender of patta.
All that a landlord has to do to justify proceedings under Ch. VI is to tender the ryot such a patta as the

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latter was bound to accept. S. 53, is confined to proceedings under Ch. VI and these proceedings are controlled by the conditions set out in S. 53. There is no inconsistency between S. 52, Cl. (3) and S. 53 ; 6 L. W. 108, Not Foll. (*Odgers and Viswanatha Sastri, JJ.*) SOLAI PILLAI *v.* TIRUMALA RAO SAHIB. **95 I. C. 250=23 M. L. W. 625= A. I. R. 1926 Mad. 756.**

—S. 53—Rights under patta—Alteration by settlement.

———*Necessity for fresh patta.*

A patta and muchilika, which are in force, must be a patta and muchilika containing the terms in force at the date of the distraint. The main object of the Act requiring exchange of patta and muchilika is that the tenant should know exactly what his rights are. Where there has been a material change in the previous patta introduced by the settlement proceedings, it is the duty of the landholder to tender a fresh patta containing all the materials required under S. 51. (*Kumaraswami Sastri and Reilly, JJ.*) RAJA OF MANDASA *v.* JAGANNAIKULU. **112 I. C. 176= 28 M. L. W. 515=1928 M. W. N. 530= A. I. R. 1928 Mad. 1103=56 M. L. J. 81.**

—S. 53—Validity of distraint.

———*Extent of.*

A distraint can be upheld to the extent of the amount legally due to the landlord though the landlord purported to effect the distraint in respect of a larger amount : 38 Mad. 1140 ; 20 M. L. J. 821 and 23 Mad. 268, Foll. (*Anantakrishna Ayyar, J.*) MAHARAJAH OF PITTAPURAM *v.* VENKATARAYANIM GARU. **122 I. C. 526=30 M. L. W. 357= 1929 M. W. N. 608=A. I. R. 1930 Mad. 22= 57 M. L. J. 260.**

———*Subsistence of patta.*

Under S. 53 it is sufficient if there was an exchange of patta and muchilika and if that patta be in force at the time when the distraint takes place or the holding is brought to sale. (*Devadoss, J.*) SANGILI NADAN *v.* SUBRAMANIA PILLAI. **103 I. C. 434= 38 M. L. T. 48=A. I. R. 1927 Mad. 1141.**

—S. 55—Jurisdiction.

———*Occupancy right.*

The question as to the occupancy right of a person is not an incidental matter but one falling within the exclusive jurisdiction of a revenue Court in a suit under Ss. 55 and 56, and the decision of a revenue Court on this point is governed by S. 189 (3) : A.I.R. 1921 Mad. 473, Dist. : Sadasiva Iyer, J., in 43 Mad. 859, Diss. from. (*Phillips and Madhavan Nair, JJ.*) RAJESWARA SETHUPATHI *v.* MUTHUDAYANA PILLAI. **112 I.C. 406=28 M.L.W. 527=52 Mad. 332= A.I.R. 1928 Mad. 1122=55 M.L.J. 379.**

—S. 55—Landlord and Tenant.

———*Lessee sub-leasing to cultivators at the passing of the Act—Right to patta.*

Appellants, who did not cultivate the lands themselves but sub-leased them to cultivating tenants, were, on the termination of the lease, served with a notice to quit. The appellants, contending that inasmuch as they were cultivating the lands as *ryots* when the Madras Estates Act of 1908 came into operation, the contract of tenancy was entirely superseded by that statute instituted a suit against the respondents for determination of a fair and equitable rent, and for grant of a *patta* in proper terms ; *Held* : The object of the Madras Estates Act 1908 is to improve the condition and confer new rights and privileges especially upon the occupying cultivators of *ryoti* lands and it would be quite opposed to its policy to confer on middlemen who

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sub-let to occupying and cultivating tenant's rights and privileges at all resembling those conferred on occupying cultivators and indeed would result in depriving the latter class of the benefits intended to be conferred upon them. (*Lord Atkinson.*) SURISETTI BUTCHAYYA *v.* PARTHASARATHY APPA RAO. **69 I.C. 1= 26 C. W.N. 785=30 M.L.T. 104= 48 I.A. 387=44 Mad. 856=14 M.L.W. 168= A.I.R. 1922 P.C. 243=41 M.L.J. 669 (P.C.)**

———*Suit for patta—Previous grant to another—Procedure—Applicability of S.* 146.

S. 146 seems to be intended to prevent landholders from contumaciously refusing to recognize transfers which are *prima facie* valid. But it cannot be read as validating transfers which are in truth invalid or as affecting the real rights of parties. When such a suit is brought the Court is bound to decide whether the plaintiff is entitled to a patta or not, if his title to it is denied. The fact that the landholder has previously recognized a rival claimant, who is alleged to have no right in the land, cannot make any difference in the matter, for any action of his, to which plaintiff is not a party, cannot be allowed to prejudice the latter's right and the defendant cannot plead that unless plaintiff has taken proper steps under S. 146 of the Estates Land Act, his suit must be dismissed. (*Ayling and Krishnan, JJ.*) RAMANATHAN CHETTY *v.* ARUNACHELAM CHETTIAR. **60 I.C. 316= 44 Mad. 43=A.I.R. 1921 Mad. 557.**

—S. 55—Suit for patta.

———*Previous grant to another—Grantee, if a necessary party—Effect of non-joinder—O. I, R.* 10 (2), *C.P.C.*

To a suit under S. 55 of the Madras Estates Land Act I of 1908, to obtain a patta from the landlord, a person to whom the landlord alleges to have already granted a patta so that he is not bound to issue a new patta to the plaintiff unless he takes proceedings under S. 146, is not a necessary party. Even if he were a necessary party, the Court should not dismiss the suit on the ground of his non-joinder but should act under O. 1, R. 10 (2) of the Civil P. C., and add him as a defendant if it thinks fit to do so. (*Ayling and Krishnan, JJ.*) RAMANATHAN CHETTY *v.* ARUNACHELAM CHETTIAR. **60 I.C. 316=44 Mad. 43= A.I.R. 1921 Mad. 557.**

—S. 56—Service grant.

———*Discontinuance of service—Effect of—*

Lands originally granted by a landlord of an estate for enjoyment upon service tenure, automatically become ryoti lands when services are discontinued by holders of such land, and no question of limitation arises in a suit by the landlord to enforce acceptance of a patta. 1 Bom. 586 and 28 Bom. 305, Dist.; 41 Mad. 554, Ref. (*Spencer, J.*) MEER MD. NOORULLA *v.* MARI NOGOPPA. **93 I.C. 259=23 M.L.W. 262= 1926 M. W. N. 2=A. I. R. 1926 Mad. 404.**

—S. 73—Jurisdiction.

———*Enquiry by Deputy Collector.*

It is a wrong view that a mere denial by the tenants ousts the jurisdiction under Ss. 73, 74 and 75, of the Deputy Collector to make enquiry. Before the Deputy Collector can act it must be shown that the petitioner was entitled to apply for appraisement and if on facts proved before him such a right is not proved, the obvious course on revision would be to set aside the order as being one passed by the Deputy Collector without jurisdiction. (*Kumaraswami Sastry, J.*) KUMARAPPA CHETTIAR *v.* PODILAL. **102 I.C. 664= 25 M.L.W. 782=39 M.L.T. 132=1928 M.W.N. 157= A. I. R. 1927 Mad. 667=53 M.L.J. 146.**

MAD. EST. LAND ACT, (1908) S. 73—Scope.

—S. 73—Scope—

———*Right of landlord to experimental harvesting.*

The claim of the landlord to have inserted in the patta any provision entitling him to make an experimental harvesting in order to determine what is his proportion of the produce of the crop is contrary to the provisions of S. 73. (*Lord Tomlin.*) RAJA OF RAMNAD *v.* MANGALAM. **A. I. R. 1930 P. C. 234.**

—S. 75—Revision.

———*Award by Sub-Collector modified by Collector—Justice done by the order—Interference by High Court*

Where the Sub-Collector made the award under S. 75 and the Collector modified it, it was held that inasmuch as substantial justice between the parties was done by Collector's order, interference by High Court was not necessary. (*Devadoss, J.*) BALASUBRAMANIA MUDALIAR *v.* CHENGALROYA CHETTY. **113 I. C. 874=A. I. R. 1928 Mad. 213.**

—S. 77—Appeal.

———*Decree of Revenue Court—Petition to execute decree—Order if appealable.*

A petition filed for the execution of a decree given by a revenue Court in a suit filed under S. 77 of the Estates Land Act is appealable and is also open to second appeal as in Civil P. C., S. 47. (*Sundaram Chetty, J.*) RAJA YARLAGADDA A. PRASAD *v.* RAVI BASAVAYYA. **100 I. C. 678=A. I. R. 1927 Mad. 440=52 M. L. J. 332.**

—S. 77—Rent suit.

———*Withdrawal and agreement to pay all arrears-inclusive of time-barred—If contrary to public policy—Suit for breach—Contract Act, Sect. 73.*

Where an agreement, which ends a zamindar's suit for rent provides that the suit should be withdrawn and that the tenants should pay all the arrears, even for time barred years, and its terms further make it clear that the agreement constitutes a new cause of action, a suit, based on the breach of it, to recover arrears according to its terms can lie to a Civil Court, and there is nothing in the terms of the agreement which is opposed to public policy underlying the provisions of Ss. 189, 199 and 211, Estates Land Act, and further the zamindar is entitled to interest up to the agreement and subsequent to it also in the form of damages. A. I. R. 1924 Cal. 388 and 33 Cal. 985, Rel. on. (*Wallace and Madhavan Nair, JJ.*) LATCHAYYA *v.* TRUSTEE OF THE VASUDEVASWAMI. **119 I.C. 718=A. I. R. 1929 Mad. 504.**

———*Illegal use of water— Claim for water rate—Teerwa jasthi.*

The plaintiff sued the defendant for the recovery of certain water rates on the ground that the defendant illegally used water of the shrotriem, to which he (the plaintiff) was entitled as the shrotriemdar, for irrigating dry land belonging to the defendant. There was a patta granted to the defendant which contained a provision for "Teerva Jasthi" *Held*: that "teerwa jasthi" refers to such a claim as that made by the plaintiff in this case for use or excessive use of water in respect of land and though the amount of instalment may not be definite, the suit was one for arrears of rent within S. 77 of the Act. (*Srinivasa Aiyangar, J.*) G. P. VENKATAYYA *v.* K. KISTAPPA. **111 I. C. 743=A. I. R. 1928 Mad. 340.**

——*When lies—Principles governing ascertainment.*

In all cases where the rent was not ascertained under Ss. 25, 30 or 45, or is not already fixed, the Court in a suit under S. 77, when the amount of rent is in dispute should, as part of its duty, ascertain the amount. One method of doing that is to ascertain the rate prevailing for similar lands with similar advantages in the neighbourhood and such a principle may well be applied to a suit for rent against a tenant when the rent is not already known or fixed: A. I. R. 1925 Mad. 464 Appr. and Foll.; 27 Mad. 143 (P. C.), Dist. (*Wallace and Thiruvenkatachariar, JJ.*) NARAYAN PATRUDU *v.* PEDDA MARANGI ESTATE. **109 I. C. 869=51 Mad. 228=27 M. L. W. 12=A. I. R. 1928 Mad. 170=54 M. L. J. 564.**

MAD. EST. LAND ACT, (1908) S. 111—Procedure.

———*Two suits, one to fix rent and another to recover it if necessary.*

When the landholder brings a suit for rent, before the Collector, under S. 77 of the Estates Land Act if the tenant disputes the amount claimed, the Collector can determine what the proper rate is. It is not necessary that the landlord should first bring a suit for determining what the amount is which this ryot is bound to pay and then bring another suit for recovery of rent. It would merely lead to multiplication of proceedings. (*Devadoss, J.*) V. MALLAYYA *v.* N. GAJAPATHIRAJU. **86 I. C. 13=21 M. L. W. 42=A. I. R. 1925 Mad. 464.**

———*Jurisdiction of Small Cause Court—Pro. Sm. C. C. Act, S. 15—C. P.. C. S. 102*

Both under the Madras Estates Land Act which definitely excludes the jurisdiction of all Civil Courts and on the true construction of S. 15 of the Provincial Small Cause Courts Act, a Small Cause Court has no jurisdiction over a suit for rent by a land-holder against his ryot, and therefore the provisions of S. 102 of the Civil Procedure Code do not apply to such a suit. 23 Mad. 547 Ref. to. 7 Bom. 100 Dist. (*Sadasiva Iyer and Napier, JJ.*) SHREE VARADARAJA *v.* KANDA BARIKIVADU. **63 I. C. 8=15 M. L. W. 150=44 Mad. 697=1921 M. W. N. 565=A. I. R. 1922 Mad. 119=40 M. L. J. 466.**

———*Landholder ceasing to be so—Jurisdiction of Revenue Court.*

———A landholder ceasing to be so on the date of suit for arrears of rent can sue in Revenue Court. (*Wallis, C. J., Oldfield and Sadasiva Aiyyar, JJ.*) VENKATA LAKSHMAMMA GARU *v.* CHINTAPALLI ACHI REDDI **62 I. C. 890=44 Mad. 433=13 M. L. W. 603=1921 M. W. N. 198=A. I. R. 1921 Mad. 152=40 M. L. J. 319 (F.B.)**

—S. 95—Illegal Distraint.

———*Cultivator not registered holder—Right to sue,*

Where the cultivator's property has been distrained wrongfuly, he is not deprived of the right of suit under the Act or of the right to plead that the distraint is not warranted by the provisions of the Act, simply because he happens to be not the registered holder, or the landholder chooses to say that he had no notice of his cultivation: *A. I. R.* 1921*Mad.* 195, *Dist.* (*Kumaraswami Sastri and Reilly, JJ.*) RAJA OF MANDASA *v.* JAGANNAIKULU. **112 I. C. 176=28 M. L. W. 515=1928 M. W. N. 530=A. I. R. 1928 Mad. 1103=56 M. L. J. 81.**

—S. 96—Interpretation.

———"*Cultivator aforesaid.*"

The term "cultivator aforesaid" in S. 96 of the Act appears to be a cultivator other than the defaulter as mentioned in S. 79 (2) of the Act. (*Kumaraswami Sastri and Reilly, JJ.*) RAJA OF MANDASA *v.* JAGANNAIKULU. **112 I. C. 176=28 M. L. W. 515=1928 M. W. . 530=A. I. R. 1928 Mad. 1103=56 M. L. J. 81.**

—S. 111—Procedure—Applicability of O, 21 R. 22, C. P. C.

Order 21, R. 22 does not apply in the case of summary procedure contained in S. 111, Madras Estates Land Act. (*Obiter*). 43 *Mad.* 351, *Rel. on.* (*Odgers, J.*)

MAD. EST. LAND ACT, (1908) S. 111—Revision.

N. SUBBA REDDI *v.* P. MARGA SASTRIAR.
118 I. C. 818=A. I. R. 1929 Mad. 517.

—S. 111—Revision.

———*Order on application for sale of holding—Board of Revenue declining to interfere—Interference by High Court—Delay in applying for revision—Right to stop sale on deposit—Acceptance of arrears by landholder will create estoppel.*

An order passed by a Revenue Divisional Officer on an application put in by a landholder under S. 111 for a sale of the ryot's holding is revisable by the High Court since the Officer is a Court subordinate to the High Court. (42 *Mad.* 76 and 42 *Mad.* 310, *Foll.*)

But where the Revision Petition in the High Court is filed more than two years after the order of the Board of Revenue refusing to interfere, the High Court will not interfere unless there has been a gross miscarriage of justice. (*A. I. R.* 1924 *Mad.* 119, *Foll.*) Sale cannot be stopped by a total stranger by depositing the amount of rent due by the defaulting ryot. He must possess an interest which will be affected by the sale. Where, however, the landholder has accepted the arrears from a person, as if it was paid for rent due by the ryot, he cannot afterwards change his mind and question the interest of the person paying it. (*Ramesam, J.*) MAHARAJAH OF JAIPUR *v.* SOBHA SUNDAR DALAI **91 I. C. 576= A. I. R. 1926 Mad. 149=49 M. L. J. 540.**

—S. 111—Sale of holdings.

———*Procedure—Technical irregularity—Effect of.*

Procedure contained in S. 111 onwards relative to the sale of holdings is not only summary, but also self-contained procedure, and as long as the provisions of this special Act are not infringed the sale cannot be impugned merely for a technical irregularity such as the failure to give notice of sale in accordance with R. 22, O. 21, C. P. Code to the legal representative of the deceased judgment-debtor when such legal representative had already taken part in the suit and had received notice of attachment: 6 *Mad.* 180; *A. I. R.* 1924 *Mad.* 431 (*F. B.*); 22 *Mad.* 119; *Dist.*; *A. I. R.* 1917 *P. C.* 156; 7 *L. W.* 614; *A. I. R.* 1921 *Mad.* 195 and *A. I. R.* 1927 *Mad.* 984, *Rel. on.* (*Odgers, J.*) SUBBA REDDI *v.* MARGA SASTRIAR. **118 I. C. 818= A. I. R. 1929 Mad. 518.**

———*Sale of—Sale set aside by Collector and purchaser dispossessed on application by third person on ground that he purchased it before the Act—Remedy of purchaser.*

A ryot's holding was sold for arrears of rent and delivered to the purchaser. One K applied to the Revenue Officer to set aside the sale alleging that the property was purchased by her before the Madras Estates Land Act. The District Collector, without notice to the purchaser, held a departmental inquiry, set aside the sale and ordered re-delivery of the property to K.

Held: that the proper suit to be filed by the purchaser would be with K as defendant and he might pray either for possession of the property or in the alternative for refund of the purchasemoney according as K had or had not title to the property by her alleged purchase and in either case the action of the Collector in cancelling the sale would be immaterial as an order passed without jurisdiction. (*Ramesam, J.*) KUNTHALA MUDALIAR *v.* VENKATA REDDIAR. **98 I.C. 726=A.I.R. 1927 Mad. 253.**

—S. 112—Action under S. 146, not taken.

———*Expiry of time allowed by Sec. 112—Effect of.*

The absence of putta and muchilika would be a proper ground for a suit under the Schdule to the Act (Part A, 12). But where no such suit is filed and the

MAD. EST. LAND ACT, (1908) S. 112—Notice.

period allowed by S. 112 is allowed to expire, S. 189 bars the jurisdiction of the Civil Court to entertain such a plea in a suit for possession by purchaser at rent sale, because it is the policy of the Act (1) to compel any person who has acquired an interest in a ryoti tenancy to follow the procedure laid down in S. 146 if he wishes to be treated as a ryot; and (2) to have all disputes as to procedure in rent sales enquired into by the Revenue Courts. To allow a person who has not taken action under S. 146, to ignore a rent-sale at the time it is held and subsequently to dispute its validity in a civil suit would run counter to both these principles. S. 189 does allow of such a construction. (*Ayling, O. C. J. and Odgers, J.*) IRULAPPAN SERVAI *v.* VEERAPPAN. **69 I.C. 918=15 M.L.W. 99= 31 M.L.T. 71=1922 M.W.N. 67= A.I.R. 1921 Mad. 637=42 M.L.J. 113.**

—S. 112—'Defaulter'—Meaning of.

The expression "defaulter" denotes only the man who is the registered pattadar or the heir of the registered pattadar or the person whom the landholder has become bound to recognise by reason of the provisions of S. 146. (*Sadasiva Aiyar and Spencer, JJ.*) MIDNAPORE ZAMINDARY CO. LTD. *v.* MUTHAPPUDAYAN. **62 I. C. 337=44 Mad. 534= 13 M. L. W. 387=A. I. R. 1921 Mad. 195= 40 M. L. J. 213.**

—S. 112—Initiation of proceedings under.

———*Commencement—Ryots if need served with notice—Transfer subsequent to issuing of notice—Effect.*

The landholder is not entitled to take nor to continue proceedings under S. 112 of the Estates Land Act after he has transferred his interest as landholder to a stranger, but he can initiate the proceeding under S. 112 and then transfer his interest. The land-holder legally initiates such a proceeding if he sends the notices contemplated by the section to the Collector in time. It cannot be said that proceedings under the section can be taken to be initiated only when the ryots were actually served with notices. (*Wallace and Anantakrishna Ayyar, JJ.*) MEENAKSHI AMMAL *v.* RANGASWAMI AIYAR. **1930 M. W. N. 353.**

—S. 112—Improper notice.

———*Validity of sale—Answer petition if can be treated as plaint.*

Under S. 112 of the Estates Land Act, the tenant has either to pay the rent due to the landlord or to file a suit within 30 days from the date of the service of notice; and if the tenant files what he wrongly calls a petition in answer to the notice issued, that petition should not be considered as a mere petition but should be considered as a plaint. If the notice under S. 112 is not a proper notice then no sale can be held under S. 112. Where the claim is illegal, the landlord is not entitled to sell the property of the tenant and say that the sale is good to the extent of the legitimate claim. (*Devadoss, J.*) RAJA OF VENKATAGIRI *v.* KOTEE SUBBAYYA. **86 I.C. 382= A.I.R. 1925 Mad. 1026.**

—S. 112—Jurisdiction.

———*Unlawful sale of ryots' property—Suit if Cognisable by Civil Court.*

A suit by a ryot who alleges that his property has been unlawfully sold can be investigated and tried by a Civil Court. 1923 *Mad.* 6 *F. B. Foll.* (*Odgers, J.*) CHIDAMBARA VELAN *v.* SANGILI SERVAI.
86 I.C. 727=1925 M.W.N. 80= A.I.R. 1925 Mad. 462=48 M.L.J. 111.

—S. 112—Notice.

———*What is proper and sufficient.*

MAD. EST. LAND ACT, (1908) S. 112—Notice—Personal service.

S. 112 does not require a statement in the endorsement of the notice returned that there was no adult male member in the family of the person to be served at his place of residence. But the Court is justified, when it has to decide whether or not there was a sufficient and proper notice under the section, in considering all questions arising from the way, in which the return was made. Where, it is clear that a copy of the notice was not served on the holder or his authorised agent, the Court can take into consideration the state of the endorsement in order to satisfy itself that the notice had or had not been served in accordance with law. (*Odgers, J.*) CHIDAMBARA VELAN *v.* SANGILI SERVAI. **86 I.C. 727=1925 M.W.N. 80=A.I.R. 1925 Mad. 462=48 M.L.J. 111.**

—S. 112—Notice—Personal service.

It is difficult to construe the clause in S. 112 enabling the landlord to affix the notice 'on some conspicuous part of the last known residence if he has any, within ten miles of the holding, should he be unable to effect personal service', to mean, that a tenant is bound to reside within 10 miles of his holding and that should he reside outside the ambit, personal service is unnecessary. (*Schwabe, C. J., Oldfield and Coutts-Trotter, JJ.*) RAJA OF RAMNAD *v.* VENKATARAMA AIYAR. **69 I.C. 923=1922 M.W.N. 501=16 M.L.W. 274=31 M.L.T. 158=45 Mad. 890=A.I.R. 1923 Mad. 66=43 M.L.J. 264. (F. B.)**

—S. 112—Premature Sale—Validity of.

Premature holding of sale does not necessarily amount to fraud vitiating a sale held under the Act. (*Oldfield and Hughes, JJ.*) R. SURAYYA *v.* DEVA NARASINGADU. **14 M.L.W. 232=A.I.R. 1921 Mad. 507.**

—S. 112—Sale proclamation—Service of by affixture.

Where the pattadar was absent at Rangoon for a considerable time, service by affixing the proclamation on the land and at the last known place of residence constitutes a perfectly legal service under S. 112. (*Oldfield and Hughes, JJ.*) R. SURAYYA *v.* DEVA NARASINGADU. **14 M.L.W. 232=A.I.R. 1921 Mad. 507.**

—S. 112—Tender of Patta.

———*To heir with name of deceased pattadar—Validity of.*

In the case of a ryot coming under the Madras Estates Land Act, the heir stands in the shoes of the ryot and is entitled to bring a suit under S. 112, and therefore a tender of patta made to the heir with the name of the deceased pattadar is valid. (*Devadoss and Jackson, JJ.*) KALIAPPA NADAR *v.* MUTHU VIJAYA THAMBAYASAMI. **106 I.C. 140=39 M.L.T. 442=A.I.R. 1927 Mad. 984.**

—S. 115—Ryoti Land.

———*Conversion into private.*

Land proved to have once been *ryoti* can never be treated afterwards as having (by any dealing by the *zamindar* or by the tenant or by both) been converted into *Kamatam* land except in the single case mentioned in the proviso to S. 115 of the Estates Land Act, namely, except where the land-holder has by his own servants or by hired labour with his own or hired stock cultivated the land as private land for 12 years immediately before the commencement of the Act. (*Sadasiva Aiyar and Napier, JJ.*) RAJA VENKATA RAMIAH *v.* LANKA LAKSHAMINARAYANA. **66 I. C. 376=45 Mad. 39=30 M. L. T. 188=15 M. L. W. 218=1921 M. W. N. 615=A. I. R. 1922 Mad. 281=42 M. L. J. 161.**

MAD. EST. LAND ACT, (1908) S. 125—Mortgage. —S. 117—Sale.

———*Absence of fresh proclamation—Agreement to waive by debtor—Validity of sale—C. P. Code O. 21, R. 66.*

The judgment-debtor's pleader requested the decree-holder that the sale should be stopped up to a certain date as he had applied for stay of execution and promised not to claim further proclamation. The sale was accordingly stopped but no order for stay was obtained up to that date. Consequently the property was sold four days after the date so consented without causing any injury thereby to the judgment-debtor but without fresh proclamation.

Held : that the sale could not be impugned. 7 All. 676 ; 16 Cal. 794, Dist. ; 39 Cal. 26 (P. C.) ; 21 M. L. J. 1008 ; A. I. R. 1921 Mad. 484, Rel. on. (*Odgers, J.*) SUBBA REDDI *v.* MARGA SASTRIAR. **118 I. C. 818=A. I. R. 1929 Mad. 517.**

—S. 118—Limitation.

———*Sale by landlord of tenant's holding—Suit to set aside—Limitation Act (9 of 1908), Art. 12.*

A sale under S. 118 of the Madras Estates Land Act is not a sale in pursuance of a decree or order of the Collector or other officer of revenue and consequently a suit to set aside the sale is not governed by Art. 12 of the Limitation Act. (*Devadoss, J.*) SUBBAYYA *v.* NARAYAN KRISTAYYA. **100 I. C. 1007=38 M. L. T. 333=A. I. R. 1927 Mad. 488=52 M. L. J. 390.**

—S. 120—Sale.

———*Property worth much more than arrears but one revenue field—Sale if fraudulent.*

If what is brought to sale for arrears of rent is a revenue field, then the landlord is not guilty of fraud in bringing to sale a property worth considerably more than the arrears for which the sale is held. (*Devadoss, J.*) SANGILI NADAN *v.* SUBRAMANIA PILLAI. **103 I. C. 434=38 M. L. T. 48=A. I. R. 1927 Mad. 1141.**

—S. 125—Burden of proof.

———*Purchaser at revenue sale—Strict compliance with requirements of Act—Proof of, if necessary.*

Where the landlord, does not seek to avail himself of the special procedure by way of distress or sale provided for by the Act but it is the purchaser in a revenue sale whose rights are sought to be limited by imposing on him a mortgage to which he would not be liable if the sale had been properly conducted, the principle that it is for the landlord who seeks to avail himself of the special procedure by way of distress provided for by the Act, to show that the requirements of the Act have been complied with, does not apply : 27 *Mad.* 94, *Dist.* (*Phillips, J.*) ARULANANDAM PILLAI *v.* MALAYA PILLAI. **91 I. C. 355=A. I. R. 1926 Mad. 401.**

—S. 125—Mortgage.

———*When binding on purchaser at revenue sale.*

Where the mortgage is not effected with the permission of the landlord under S. 125 it is not binding on a purchaser in a revenue sale. (*Phillips, J.*) ARULANANDAM PILLAI *v.* MALAYA PILLAI, **91 I. C. 355=A. I. R. 1926 Mad. 401.**

———*Mortgage created before the Act—Amount which usufructuary mortgagee is entitled under T. P. Act, S. 72 (b) to add to the principal money if exempted.*

Sums claimed by a usufructuary mortgagee as part of the mortgage money by virtue of S. 72 (b) of the Transfer of Property Act are also saved by S. 125 of the Madras Estates Land Act, where the mortgage was created before the Act. (*Spencer and Ramesam, JJ.*) VENKATA NARASIMHA RAJU *v.* KUPPU

MAD. EST. LAND ACT, (1908) S. 125—Prior purchase.

CHETTY. **63 I. C. 24=1921 M. W. N. 479=A. I. R. 1921 Mad. 480=40 M. L. J. 524.**

—S. 125—Prior purchase.

———*Prior purchase—If an encumbrance.*

Prior purchase of a holding does not amount to an encumbrance within the meaning of S. 125. (*Ramesam, J.*) KUTHALA MUDALIAR *v.* VENKATA REDDIAR. **98 I. C. 726=A. I. R. 1927 Mad. 253.**

—S. 125—Rights of purchaser.

———*Revenue Sale—Occupancy right not put an end to—Mortgage sale—Acceptance of rent from purchaser at such sale for defaulter—Effect of.*

Under S. 125 a purchaser ina sale for arrears of rent takes subject to encumbrances created before the passing of the Act where the landlord did not put an end to the occupancy right of the defaulter under cover of his rent sale but on the contrary accepted subsequently rent from the purchaser in a mortgage sale, on behalf of the defaulter. *Held*, that the purchaser in the mortgage sale had superior rights over the purchaser in the sale for arrears of rent. (*Wallace, J.*) PACHALLA DORAISWAMI AIYANGAR *v.* S. MAHANT PRAYAGA DASGEE. **82 I. C. 721=1924 M.W.N. 670=A. I. R. 1924 Mad. 918.**

—S. 125—Rights of purchaser.

———*Mortgage sale—Rent sale.*

A purchaser in execution of a mortgage executed after the Act but for a portion of the amount due under the mortgage prior to the Act has a better title than an auction-purchaser in execution of a decree for rent by the landlord. (*Krishnan, J.*) SUNDERAMIAH *v.* VENKATASUBBIAH. **84 I. C. 788=19 M. L. W. 537=34 M. L. T. 107=1924 M. W. N. 320=A. I. R. 1924 Mad. 619=46 M. L. J. 380.**

—S. 125—Sale.

———*Immunity under S. 125—When arises.*

Primarily when in S. 125 the legislature speaks of sales of holding for arrears of rent it must be taken that the reference in that section is only to the sale of the raiyat's holding as prescribed in the Act in S. 111 and the following sections and, therefore, the immunity provided in S. 125 arises only when the sale is under that sub-division, namely under Ss. 111, 112 and so on; the immunity extends to sale by revenue Courts by virtue of S. 132, but not when the sale is by the Civil Court : 43 Mad. 786 Foll. and 42 Mad. 114, Dist. (*Srinivasa Ayyangar and Reilly, JJ.*) SUBBARAYUDU *v.* VENKATARATNAM. **110 I. C. 136=51 Mad. 632=1928 M. W. N. 266=28 M. L. W. 477=A. I. R. 1928 Mad. 1074=55 M. L. J. 314.**

—S. 125—Scope.

———*Rights acquired before Act.*

Any right acquired before the passing of the Estates Land Act in the holding is saved by S. 125 of the Act. (*Devadoss, J.*) VENKATRAYUDU *v.* MAHARAJA OF PITTAPURAM. **106 I.C. 663=31 Mad. 774=27 M.L.W. 139=1928 M.W.N. 52=A.I.R. 1928 Mad. 360=54 M.L.J. 138.**

—S. 131—Application to set aside sale.

———*Delay in deposit excused—Revision if lies.*

In an application under S. 131 the applicant not being aware of the exact amount he had to deposit, applied to the Deputy Collector himself, who conducted the sale and before whom the application was filed, paid it and subsequently when the exact amount was discovered the period of 30 days had expired but the delay was excused and the balance due was received and the sale was set aside. *Held* (1) that the delay was due to an Act of the Court and hence could be excused; (2) that there was no want of jurisdiction in the lower Court to excuse the delay under the circumstances. (25 Cal. 216; 25 Cal. 639, Foll.; 26 Cal. 449, Dist.) (*Kumaraswami Sastri, J.*) ADIMOOLA MUDALIAR *v.* MANICKA MUDALIAR. **78 I.C. 142=19 M.L.W. 238=34 M.L.T. 10=1924 M.W.N. 230=A.I.R. 1924 Mad. 592=46 M.L.J. 329.**

MAD. EST. LAND ACT, (1908) S. 145—Right to collect revenue.

—S. 131—Application to set aside sale.

———*Notice to auction purchaser—Necessity of.*

The auction-purchaser under a sale for rent, has a right to notice of an application by the ryot to set aside the sale and is entitled to be heard before any order is passed. (*Seshagiri Aiyar, J.*) VAITHIALINGA CHETTY *v.* KULLAPPA NAICKER. **59 I.C. 889=12 L.W. 354.**

—S. 131—Jurisdiction of Civil Court.

———*Plea of fraud.*

The right to set aside a sale conferred by S. 131 of the Estates Land Act does not take away the right of suit in the ordinary Civil Courts to set aside the sale on the ground of fraud. 26 M.L.J. 36, Foll. (*Phillips, J.*) ERAPPA REDDI *v.* PEDAMUNISAMI SETTI. **91 I.C. 264=23 M.L.W. 411=1926 M.W.N. 325=A.I.R. 1926 Mad. 161=49 M.L.J. 560.**

—S. 131—Limitation

———*Limitation Act, Art.* 12 (*b*).

As a sale becomes final, in the absence of any application under S. 131, Estates Land Act, within 30 days after the date of sale, a suit to set aside the sale brought more than one year after such date is barred by limitation. (*Phillips and Venkatasubba Rao, JJ.*) KAMULAMMAL *v.* N. CHOKALINGAM ASARI. **76 I.C. 840=19 M.L.W. 81=33 M.L.T. 204=1924 M.W.N. 37=A.I.R. 1924 Mad 278=45 M.L.J. 840.**

—S. 131—Suit to set aside sale.

———*Ryot applying under S. 131 and failing—Subsequent suit in Civil Court if barred.*

The Civil Courts have jurisdiction in all cases in which they would have had jurisdiction prior to the Estates Land Act except in so far as such jurisdiction is expressly or by necessary implication taken away by the provisions of S. 189 of the Estates Land Act. The fact therefore that two unsuccessful applications were made by the ryot under S. 131 does not take away this right of suit under the Civ. Pro. Code. (A.I.R. 1923 Mad. 6 (F. B.), Foll. (*Odgers and Visvanatha Sastri, JJ.*) MAHALINGA NAICKER *v.* VELLAYA NAICKER. **92 I.C. 412=49 Mad. 490=22 M.L.W. 794=1925 M.W.N. 884=A.I.R. 1926 Mad. 190=51 M.L.J. 559.**

—S. 132—Scope.

S. 132 relates only to a question of procedure and does not affect the substantive rights of the parties. 26 Mad. 686 (F.B). Appl. (*Phillips, J.*) KOTAYYA *v.* KOTAPPA. **90 I.C. 531=23 M. L.W. 178=1925 M.W.N. 722=A.I.R. 1926 Mad. 141=49 M.L.J. 117.**

—S. 145 to 148—Right to collect revenue.

———*Conversion of ryotwari into ryoti tenure—If legal.*

It is open to the Government to enter into an arrangement with the Zamindar to keep the ryotwari tenure as such and to give him the right to collect the revenue payable to Government, but in the absence of clear evidence it should not be lightly held that the Government made a ryotwari tenant a ryot under a Zamindar. The Government have no power in the absence of Legislative sanction to convert a ryotwari tenure into a ryoti tenure in an estate.

MAD. EST. LAND ACT, (1908) S. 146—Transfer.
(*Devadoss, J.*) M. SURAYYA *v.* SURYA RAO.
88 I. C. 99=22 M. L. W. 376=
1925 M. W. N. 730=A. I. R. 1925 Mad. 771=
48 M. L. J. 577.

—S. 146—Transfer.
———*Notice to landlord—Failure to give notice—Effect of.*

S. 147 was intended to lay down clearly that the landlord is entitled to continue to deal with the existing *pattadar* until notice of transfer is given him, and is applicable to transfers made before the commencement of the Act, and does not determine any substantive right, S. 146 lays down that when there has been a transfer, whether before the commencement of the Act or after it, the transferee will be entitled to be impleaded in proceedings if he gives the notice which S. 146 prescribes; but that until he does so, the existing *pattadar* will still be the person with whom the landlord has to deal and the transferee will be bound by any decree passed against him. (*Oldfield and Ramesam, JJ.*) SRI MAHANT PRYAJ *v.* SARANGAPANI. **86 I. C. 647=**
17 M. L. W. 361=32 M. L. T. 251=
1923 M. W. N. 193=A. I. R. 1923 Mad. 486.

———*Steps to be taken.*

Where no proceedings are taken under S. 146 to obtain transfer of tenancy, the mere fact that rent was once taken from the alleged transferee, will not effect a transfer of the tenancy. (*Ayling, A. C. J. and Odgers, J.*) IRULAPPAN SERVAI *v.* VEERAPPAN.
69 I. C. 918=15 M. L. W. 99=
31 M. L. T. 71=1922 M. W. N. 67=
A. I. R. 1921 Mad. 637=42 M. L. J. 113.

———*By operation of law—Notice if necessary.*

Though the landlord under S. 146 of the Madras Estates Land Act is not bound to recognise a transfer by the act of the ryot or even in execution of a Civil Court's decree or by act of a public officer exercising statutory powers of sale unless both the transferor and transferee give notice to him in writing, or the decree or order of the Civil Court establishing the transfer, or the sale certificate of a public officer evidencing that transfer is produced, so far as transfer to the heir from the registered pattadar, by operation of law, is concerned, there is nothing in the Act which absolves the Zamindar from the duty of recognising such a transferee as the ryot who holds the land under the landlord in succession to the deceased ryot. (*Sadasiva Aiyar and Spencer, JJ.*) MIDNAPORE ZEMINDARY CO. LTD., *v.* MUTHAPPUDAYAN.
62 I. C. 337=44 Mad. 534=13 M. L. W. 387=
A. I. R. 1921 Mad. 195=40 M. L. J. 213.

—S. 147—Applicability.

Section 147 in terms applies to proceedings under S. 42. (*Wallace and Srinivasa Ayangar, JJ.*) SUBBA REDDY *v.* VENKATASUBBA REDDY. **110 I. C. 539=**
51 Mad. 755=28 M. L. W. 558=
A. I. R. 1928 Mad. 519=55 M. L. J. 72.

—S. 151—Diversion.
———*From agricultural purpose—Effect of.*

The principle that seems to underlie S. 151 is that when a holding is in the possession of a tenant he holds it on the terms agreed to or settled between the parties only for agricultural purposes and that as such tenant he is not at liberty to divert the land from the main purpose of the holding, namely, the agricultural purpose and any such diversion will entail forfeiture whereupon the landholder might sue the tenant in ejectment. (*Wallace and Srinivasa Aiyangar, JJ.*) NARAYANA RAO *v.* RAJAH VASIREDDI. **110 I. C. 366=51 Mad. 478=**
1928 M. W. N. 694=27 M. L. W. 845=

MAD. EST. LAND ACT, (1908) S. 123—Ejectment Suit.
A. I. R. 1928 Mad. 564=54 M. L. J. 621.

———*From agricultural purposes—What constitutes—Putting up building—Effect of.*

Where the direct object of the alienee from occupancy tenant in putting up the building was to use the building for residential purposes and the area covered by building and compound was merely half of the whole it was *held* that the act was substantially to divert the land from agricultural purposes within S. 151. (*Wallace and Srinivasa Aiyangar, JJ.*) NARAYANA RAO *v.* RAJAH VASIREDDI. **110 I. C. 366=**
51 Mad. 478=27 M. L. W. 845=
1928 M. W. N. 694=A. I. R. 1928 Mad. 564=
54 M. L. J. 621.

———*From agricultural purposes—Sale for building purposes—Effect of value of holding.*

Where 14 acres out of 15 and odd acres of land leased for agricultural purposes is sold by the tenant by selling 14 acres out of 15·65 acres for building purposes so that the tenants in effect converted the agricultural land into building sites it was held that they have materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes. (*Phillips, J.*) VASIREDDI *v.* KAMESWARASOMAYAJULU.
92 I. C. 402=22 M. L. W. 833=
1925 M. W. N. 776=A. I. R. 1926 Mad. 157=
50 M. L. J. 97.

—S. 151—Scope of.
———*Possibility of impairment, if enough.*

What S. 151 provides is that what has been done must have already materially impaired the value of the holding and rendered it already substantially unfit. The mere possibility of the land or even the certainty of the land being so built upon becoming unfit for agricultural purposes would not be sufficient to bring in the operation of S. 151. (*Wallace and Srinivasa Aiyangar, JJ.*) NARAYANA RAO *v.* RAJAH VASIREDDI. **110 I. C. 366=**
51 Mad. 478=1928 M. W. N. 694=
27 M. L. W. 845=A. I. R. 1928 Mad 564=
54 M. L. J. 621.

—S. 153—Ejectment Suit.
———*Non-occupancy ryot holding under lease executed prior to Act and continuing from year to year—Suit to eject—Proper* forum.

A suit for ejectment by ryot against a non-occupancy ryot on the ground that the defendant was let into the land as plaintiff's tenant for four years under a muchilika, dated 20th March 1908, that is, prior to the passing of Act 1 of 1908, and that since the expiry of the lease in 1912 defendant has been continuing under oral leases from year to year is not governed by S. 153 and the Civil Court is, therefore the proper *forum* in which the suit must be brought. (*Wallace, J.*) GANAPATI RAO *v.* SATTAMMA.
112 I. C. 400=A. I. R. 1928 Mad. 960.

———*Non-occupancy ryot—Jurisdiction of Civil Court.*

Section 153 is exhaustive of the grounds of the suit before the Collector but not exhaustive in the sense that the suits for ejectment of non-occupancy ryot lie only before the Collector. It may be that as to old waste the effect of S. 157 is to prohibit a suit for ejectment on grounds other than those in S. 153 (which can be only before a Civil Court) though even then the proviso to S. 153 prevails over both Ss. 153 and 157. But as to other non-occupancy ryots there is no section and suits lie before Civil Court if based on grounds other than those mentioned in S. 153. (*Coutts-Trotter, C. J., Ramesam and Wallace, JJ.*)

MAD. EST. LAND ACT, (1908) S. 162—Cultivable —Waste land.

GOVINDA v. CHENGALROYA. **83 I. C. 74= 35 M. L. T. 29=1924 M. W. N. 733= 47 Mad. 896=A. I. R. 1925 Mad. 22= 47 M. L. J. 415. (F. B.)**

—S. 162—Cultivable—Waste Land.

———*Suit for mesne profits—Jurisdiction of Civil Court.*

When the definition of raiyati lands speaks of cultivable lands it means land that is ordinarily and usually cultivated and it does not refer to waste land though even waste land can at times be cultivated with labour and expenditure of money. Mesne profits of such waste lands can therefore be ascertained by the Civil Court. (*Krishnan, J.*) A. SUBAYYA *v.* R. VENKATARAMIAH. **79 I. C. 718= 19 M. L. W. 626=34 M. L. T. 233= 1924 M. W. N. 630= A. I. R. 1924 Mad. 832=47 M. L. J. 469.**

—S. 164—Scope.

———*Ryot mentioned in record of rights—Suit under Ss.* 173 *and* 179, *if necessary.*

The scheme of Chap. 11 would seem to show that where a ryot is only mentioned as a ryot in respect of a particular holding in the Record-of-Rights, no suit need be instituted under Ss. 173 and 179, on pain of the party being unable to agitate that question further. (*Anantakrishna Ayyar, J.*) PUTTA CHELAMIAH *v.* VENKATAKUMARA MAHIPATI SURYARAO BAHADUR GARU. **121 I. C. 765=A. I. R. 1930 Mad. 1.**

—S. 167—Entries.

———*In Record of Rights—Value of.*

Section 167 (3) does not declare that any entries in the Record-of-Rights mentioned therein shall be conclusive and that the correctness of the same should not be contested unless a suit is filed. It only says that the Record-of-Rights shall be evidence and its correctness shall be presumed : A. I. R. 1927 Cal. 210 and A. I. R. 1925 Cal. 845, Ref. (*Anantakrishna Ayyar, J.*) PUTTA CHELAMIAH *v.* VENKATAKUMARA. **121 I. C. 765=A. I. R. 1930 Mad. 1.**

—S. 168—Interpretation.

———*'Preceding ten years'—Meaning of—Exclusion of famine years.*

" Preceding ten years " in Cl. (a) of S. 40 (3) means the ten years preceding the year in which the Collector determines the amount of the commuted rent and not the ten years preceding the year in which the suit is instituted. The " ten years " refer to the preceding ten years other than the years which the Local Government may notify to be or to have been famine years, thus excluding from the ten years any years which may have been so notified. The exclusion of any year or years from the ten years' period does not mean that the statutory term is thereby extended.

In settling fair and equitable rent under S. 168 (2) the average of ten years is only to form one of the considerations for the fixing of commuted rent, and the Court is at liberty to take other facts also into consideration where the circumstances are peculiar, such as where some of the ten years are extraordinary years. (*Waller and Madhavan Nair, JJ.*) RAMAYYA *v.* ZAMINDAR OF MANDASA. **95 I. C. 963= 1926 M. W. N. 351=A. I. R. 1926 Mad. 760.**

—S. 171—Jurisdiction.

———*Power of a single member.*

A single member of the Board of Revenue has power to decide questions under Ss. 171 and 172, Madras Estates Land Act, if the Board has declared that the questions may be disposed of by him. (*Phillips, Krishnan and Ramesam, JJ.*) ZAMINDAR OF KALLIKOTE & ATAGADA ESTATE *v.* MONGOLO-

MAD. EST. LAND ACT, (1908) S. 185—Method of proof.

PUR. **97 I.C. 921=24 M.L.W. 416= A.I.R. 1926 Mad. 1047= 51 M.L.J. 500. (F.B.)**

—S. 171—Revision.

Quaere : Whether the High Court has jurisdiction to interfere in revision with the orders of the Board of Revenue under Ss. 171 and 172. (*Phillips, Krishnan and Ramesam, JJ.*) ZAMINDAR OF KALLIKOTE & ATAGADA ESTATE *v.* MONGOLOPUR. **97 I.C. 921= 24 M.L.W. 416=A.I.R. 1926 Mad. 1047= 51 M.L.J. 500 (F.B.)**

———*Orders under, by Board of Revenue—Revision by High Court.*

The High Court has revisional jurisdiction over the orders of the Board passed under Ss. 171 and 172 of the Estates Land Act : (Case-law discussed.), (*Devadoss and Waller, JJ.*) SANKA RAO *v.* RYOTS OF KALAGAMPUDI. **94 I.C. 164=49 Mad. 499= 23 M.L.W. 320=1926 M.W.N. 131= A.I.R. 1926 Mad. 430.**

———*Revision—Board of Revenue—If Subordinate to High Court.*

The Board of Revenue is not a Court subordinate to the High Court for the purposes of this section. Per *Spencer, J.* (Contra Devadoss, J.) (*Spencer and Devadoss, JJ.*) B. APPANNA *v.* A. LATCHAYYA. **79 I.C. 372=33 M.L.T. 92=18 M.L.W. 849= 47 Mad. 250=A.I.R. 1924 Mad. 119= 45 M.L.J. 735.**

———*No remedy by suit—Order revisable.*

The High Court does not interfere as a rule with the orders of Courts subordinate to it over which it has revisional jurisdiction in cases where there is another remedy open to the party than by revision. Where a revenue officer acting under Ch. 11 and about to detemine a fair and equitable rent, erroneously considers himself bound by S. 30 he does not exercise his jurisdiction and as the parties have no right of suit in such a case, the High Court would be justified in exercising revisional jurisdiction. (*Devadoss and Waller, JJ.*) SANKARAO *v.* RYOTS OF KALAGAMPUDI. **94 I.C. 164=49 Mad. 499= 23 M.L.W. 320=1926 M.W.N. 131= A.I.R. 1926 Mad. 480.**

—S. 179—Suit for declaration.

Wrongentry in Record-of-Rights—Limitation—Limitation Act, Art. 120.

A suit for declaration that an entry in the Record-of Rights that the defendants are ryots with permanent rights of occupancy is wrong is not barred by reason of the fact that the defendants had, in a previous suit more than six years of the institution of the suit for declaration, set up rights of permanent occupancy in the written statement as against the plaintiffs and to their knowledge, the cause of action based on the entry in record-of-rights being an independent one from the one based on such denial : 36 Mad. 383, Rel. on. (*Sundaram Chetty, J.*) SURYANARAYAN *v.* BULLAYYA. **101 I.C. 85= 25 M.L.W. 367=A.I.R. 1927 Mad. 568= 52 M L.J. 323.**

—S. 185—Method of proof.

———*Conversion of ryoti land into private land—Evidence after* 1898—*Value of.*

Section 185 deals only with the method of proof and does not enact any rule of substantive law.

There is nothing in S. 185 or S. 8 (i) to justify the contention that ryoti land could not before the date of the Act be converted into private land.

In order to see whether a particular land was landholder's private land, evidence subsequent to 1898

MAD. EST. LAND ACT, (1908) S. 185—Private land.

is by implication excluded. If the question is whether a plot of land is ryoti land or private land, the landholder, to make out his contention that they are private, cannot rely upon leases made subsequent to July 1898. But such leases can be put in evidence for the purpose of showing not the character of the land (ryoti or kamatam), but for showing that, if the land had been treated; as private lands till 1898 they were not treated differently subsequent to that date: 36 Mad. 168, Rel. on. (*Krishnan and Venkatasubba Rao, JJ.*) VEERABHADRAYYA *v.* NAGANNA NAIDU.

98 I.C. 828=50 Mad. 201=24 M.L.W. 579=1926 M.W.N. 869=A.I.R. 1927 Mad. 41=52 M.L.J. 38.

—S. 185—Private land.

———*Conversion into ryoti land—Successor of landholder if bound by the transaction.*

There is nothing to prevent a land-holder from converting his private lands into *ryoti* lands and where a land-holder does convert private land into *ryoti* land, his successor could not avoid the transaction by merely issuing notices to quit or by any alteration in his own registers. (*Spencer and Devadoss, JJ.*) SARAVANAPERUMAL *v.* SUBBAYYAN.

16 M.L.W. 802=1922 M.W.N. 763=31 M.L.T. 430=A.I.R. 1922 Mad. 514.

—S. 187—Contracts.

———*For enhanced rent—Enforceability of.*

The fact that S. 187 does not specifically mention contracts for enhancing rent, does not render the contract unenforceable. (*Devadoss, J.*) VENKATARAMANACHAR *v.* VALLAI IBRAHIM SAHIB.

83 I.C. 130=20 M.L.W. 582=1924 M.W.N. 897=A.I.R. 1924 Mad. 897.

—S. 187—Estoppel.

———*Question whether suit land is in estate or not itself in dispute—Previous suit deciding that question against tenant—Tenant submitting and obtaining muchilika—Estoppel—Evidence Act, Sect.* 116.

Although where the lands are lands in an estate, a tenant cannot contract out of his occupancy rights, *i.e.* however much he may contract to surrender the land at the end of the period of a muchilika, such a clause would be void and in spite of the clause he may continue in possession; still where the question whether the land is in an estate or not is itself in dispute and the dispute has been settled by a Court of Law against the contention of the tenant that the land is in an estate, and therefore, *prima facie* the Estates Land Act does not apply, if the tenant submits to the decision and obtains a muchilika he will be estopped from raising the question that the lands are in an estate so long as he keeps possession under the muchilika and has not surrendered vacant possession: A.I.R. 1922 P.C. 241; A.I.R. 1925 Mad. 1043; 29 Cal. 518; 34 Mad. 211, Rel. on.; (1895) 2 Ch. 273 and (1899) A. C. 144; Re. Anderson Pegler *v.* Gillatt, (1905) 2 Ch. 70; Re. Coole Coole v. Flight, (1922) 2 Ch. 536 Dist. 22 Bom. 348, Ref. (*Ramesam and Venkatasubba Rao, JJ.*). RAMALINGA MUDALI *v.* RAMASWAMI AYYAR.

119 I.C. 577=29 M.L.W. 760=1929 M.W.N. 239=A.I.R. 1929 Mad. 529.

—S. 189—Agreement for arrears of rent.

———*Inclusive of time-barred—If contrary to public policy—Suit for breach—Contract Act, Sec.* 73.

Where an agreement, which ends a zamindar's suit for rent provides that the suit should be withdrawn and that the tenants should pay all the arrears, even for time barred years, and its terms further make it clear that the agreement constitutes a new cause of action, a suit, based on the breach of it, to recover arrears according to its terms can lie to a Civil Court,

MAD. EST. LAND ACT, (1908) S. 189—Jurisdiction of Revenue Court.

and there is nothing in the terms of the agreement which is opposed to public policy underlying the provisions of Ss. 189, 199 and 211, Estates Land Act, and further the zamindar is entitled to interest up to the agreement and subsequent to it also in the form of damages: A. I. R. 1924 Cal. 388 and 33 Cal. 985, Rel. on. (*Wallace and Madhavan Nair, JJ.*) LATCHAYYA *v.* TRUSTEES OF WASUDEVA SWAMI.

119 I. C. 718=A. I. R. 1929 Mad. 504.

—S. 189—Grant of whole village.

———*Presumption as to Melwaram—'Mousa'—Meaning of.*

The grant of a whole village will not be presumed to be the grant only of *melwaram* interest unless it is shown that the *kudivaram* interest was already in the hands of some one else than the donee. The division of produce between the Agraharamdars and the cultivators, throws light on the system then prevalent of paying *cist* to the land owner, but it is no indication whether the tenant had or had not occupancy rights. The word '*mouza*' does not necessarily import the meaning that there were occupancy ryots on the land. The word '*Kadim*' does not convey anything as to the existence of occupancy rights. (*Spencer and Venkatasubba Rao, JJ.*) J. SOORAYYA *v.* T. SURYARAO NAIDU.

72 I.C. 795=17 M.L.W. 555=A.I.R. 1923 Mad. 623=45 M.L.J. 41.

—S. 189—Jurisdiction of Civil Court—Presumption as to.

The initial presumption is in favour of the Civil Court having jurisdiction. Where the suits are instituted in a Civil Court the onus lies on the defendants to show that that Court's jurisdiction is ousted by S. 189 of the Madras Estates Land Act. 33 M. 208, Ref. (*Spencer and Odgers, JJ.*) BHUPATIRAJU *v.* VENKATARATNAM.

70 I.C. 452=1921 M.W.N. 821=A.I.R. 1921 Mad. 629=41 M.L.J. 512.

—S. 189—Jurisdiction of Civil Court—Suit to set aside sale.

A suit by ryot to set aside a sale of his holding which was held under the provisions of Ch. VI lies in Civil Court. (*Schwabe, C. J.; Oldfield and Coutts-Trotter, JJ.*) RAJA OF RAMNAD *v.* VENKATARAMA AIYAR.

69 I.C. 923=1922 M.W.N. 501=16 M.L.W. 274=31 M.L.T. 158=45 Mad. 890=A.I.R. 1923 Mad. 6=43 M.L.J. 264 (F.B.)

—S. 189—Jurisdiction of Insolvency Court.

———*Kist due to insolvent by ryot—Presidency Towns Insolvency Act, S.* 36.

The Official Assignee cannot apply to the Judge of the Insolvency Court for an order against a *ryot* for payment of *kist* due to the insolvent. The jurisdiction exercised by the High Court in insolvency is the Original Civil Jurisdiction. The provisions of S. 189 of the Madras Estates Land Act which debar Civil Courts, exercising original jurisdiction, from taking cognizance of any dispute or matter in respect of which a suit or application might be made to a Revenue Court cannot be overridden by S. 36 of the Presidency Towns Insolvency Act, which provides for the determination by the Insolvency Court of all questions relating to debts due by third parties to the insolvent. (*Kumaraswami Sastri, J.*) *In the matter of* T. A. CHIDAMBARA CHETTY.

61 I.C. 991=45 Mad. 31=13 M.L.W. 374=A.I.R. 1922 Mad. 143.

—S. 189—Jurisdiction of Revenue Court—Occupancy right.

The question as to the occupancy right of a person is not an incidental matter but one falling within the

MAD. EST. LAND ACT, (1908) S. 189—Rent sale.

exclusive jurisdiction of a revenue Court in a suit under Ss. 55 and 56, and the decision of a revenue Court on this point is governed by S. 189 (3): A.I.R. 1921 Mad. 473, Dist.: Sadasiva Iyer, J., in 43 Mad. 859, Diss. from. (*Phillips and Madhavan Nair, JJ.*) SETHUPATHI *v.* MUTHUDAYANA PILLAI.

112 I.C. 406=52 Mad. 332=28 M.L.W. 527=A.I.R. 1928 Mad. 1122=55 M.L.J. 379.

—S. 189—Rent Sale.

———*Suit to set aside for fraud—Jurisdiction of Civil Court—C. P. Code, O. 21, R. 90.*

A suit lies in civil Court to set aside a sale in execution of a rent decree on the ground of fraud or material irregularity in publishing and conducting the sale: A. I. R. 1924 Mad. 431, Ref. Observations in 43 Mad. 351, Diss. from. (*Devadoss and Jackson, JJ.*) JAGANNATHA PILLAI *v.* KATHAPERUMAL PILLAI.

105 I. C. 88=51 Mad. 76=26 M. L. W. 572=39 M. L. T. 389=1927 M. W. N. 913=A. I. R. 1927 Mad. 1035=53 M. L. J. 688.

———*Registered holder benamidar—Suit to set aside by real owner—Jurisdiction of Civil Court.*

The real owner of a ryotwari holding can sue in a Civil Court for a declaration that certain lands belong to him and that the registered holder is only a benamidar: A. I. R. 1923 Mad. 6, (F. B.) Rel. on. (*Viswanatha Sastri, J.*) SEETHARAMA NAIDU *v.* GOVINDASAMI CHETTIAR.

92 I. C. 976=23 M. L. W. 149=1926 M. W. N. 162=1926 M. W. N. 480=A. I. R. 1926 Mad. 352.

—S. 189—Revenue Court decision.

———*How far binds Civil Court.*

The decision of Revenue Court in a suit exclusively triable by it, does not bind the Civil Court, though the subsequent suit could not be brought in the Revenue Court, as S. 189 (3) is not more comprehensive than S. 11 of the C. P. Code. (*Sadasiva Aiyar and Spencer, JJ.*) SOBHANADRI APPARAO *v.* DATHADU VENKATA RAJU.

60 I.C. 700=12 L.W. 512=28 M.L.T. 359=(1920) M.W.N. 639=43 Mad. 859=39 M.L.J. 476.

—S. 189—Suit for possession.

———*Ryot if can plead want of issue of patta under S. 53.*

The fact that a remedy lies by summary suit to prevent the sale under S. 112 would bar a subsequent civil suit to set it aside. Therefore the question whether a patta had been tendered under S. 53 being a matter in respect of which a suit might be brought under S. 112, cannot be urged by the ryot as a defence to suit for possession after sale that no patta, was issued under S. 53; A.I.R. 1923 Mad. 6 (F.B.) Dist.; A.I.R. 1921 Mad. 637, Rel. on. (*Jackson, J.*) AIYYA MUDALI VELALAN *v.* SOURIMUTHU ODAYAN.

103 I.C. 851=1927 M.W.N. 304=38 M.L.T. 362=A.I.R. 1927 Mad. 713=53 M.L.J. 222.

—S.—191—Applicability.

———*Suit for rent under S. 577—Appeal to Agent—Limitation—Vizagapatam Agency Rules, R. 56—General and special Acts.*

Held (on a difference of opinion between Curgenven and Anantakrishna Aiyar, JJ.) that the period of limitation applicable to appeals preferred to the Agent, Vizagapatam Agency, in suits for rent instituted under S. 77 of the Madras Estates Land Act is six weeks as provided for by R. 56 of the Vizagapatam Agency Rules and not thirty days as provided for by S. 191 of the Estates Land Act, Assuming that the Estates Land Act is a special Act, S. 191 contains a general provisios and cannot be taken to

MAD. EST. LAND ACT, (1908) S. 205—Procedure—Board of Revenue.

repeal R. 56 of the Agency Rules by implication. (*Ramesam, J.*) THAMMAYYA *v.* SRI RAJAH DUGARAJ BAHADUR GARU.

1930 M. W. N. 475.

—S. 192—Appeal.

———*Rent decree—Order in execution.*

No doubt an order under O, 21, R. 92, C. P. Code passed in execution of a decree is not appealable by virtue of S, 192, Cl. (a), Madras Estates Land Act, but if the order passed does not come within R. 92, or under any other rule under which an appealable order could be passed under O. 43, but is an order in execution proceedings, then S. 47, C. P. Code would apply and an appeal would lie. 30 M. L. J. 611 and 11 L. W. 59, Rel. on. (*Devadoss, J.*) SUNDARASWAMIAR *v.* NARAYANASWAMIAR.

109 I. C. 722=A. I. R. 1928 Mad. 1107.

———*Order of remand.*

No appeal lies to the High Court from an order of remand by District Judge in an appeal from a suit for rent under the Act, even where the District Judge decided the issues which dealt with the rights of the parties and remanded the case only to ascertain the amount due and thus the order of remand need not have been made at all, but a mere calling for finding would have satisfied the ends of justice: 12 I. C. 146: 1 L. W. 667, Foll. and A. I. R. 1922 Mad. 112, Expl. (*Kumaraswami Sastri and Reilly, JJ.*) SOBHANADRACHARYULU *v.* VENKATA NARASIMHA CHARYULU.

113 I. C. 552=A. I. R. 1928 Mad. 1062.

—S. 192—Claim petition.

———*Revenue Court.*

There is no express provision under the Estates Land Act which exempts O. 21 from applying to proceedings in execution of rent decrees. In the absence of specific provisions to the effect that a claim petition is not to be entertained by a revenue Court, it cannot be laid down that an application under O. 21, R. 58, cannot be made to the revenue Court. (*Devadoss, J.*) VENKATARAYUDU *v.* MAHARJA OF PITHAPURAM.

106 I. C. 663=51 Mad. 774=1928 M. W. N. 52=A. I. R. 1928 Mad. 360=54 M.L.J. 138.

—S.205—Procedure—Board of Revenue

—(Per Phillips and Odgers, JJ.) *Power under C. P. Code S. 115 is inconsistent with that under S. 205, Madras Estates Land Act—High Court cannot revise orders of the Board of Revenue passed under Ch. 11 or S. 205, Madras Estates Land Act* (Venkatasubba, Rao, J. contra) —*C. P. Code, S. 115—Government of India Act, S. 107—Madras Estates Land Act, S. 205—Letters Patent (Madras), Cl. 15*: 49 Mad. 499=A.I.R. 1926 Mad. 480=94 I. C. 164., Overruled: (Case-law discussed).

The mere fact tact the Civil Procedure Code is made applicable to proceedings under the Act including presumably the proceedings of the Board of Revenue cannot by itself convert the Board of Revenue into a Civil Court subordinate to the High Court unless for some other reason it is a Civil Court subordinate to the High Court.

The circumstances that under O. 46, R. 1, C. P. Code which is made applicable under the Act, the Board of Revenue can make a reference to the High Court on a question of law, and that under S. 202 "the High Court may, with the approval of the Local Government, make rules consistent with this Act, declaring that any portions of the Civil Procedure Code cannot apply, etc.," can hardly be deemed to give power of superintendence to the High Court: 27 Bom. 575 and 30 Bom. 246 (P. C.), Dist.: A. I. R. 1923 Cal, 169, Foll.; A, I, R, 1921 Cal, 262, Appr,:

MAD. EST. LAND ACT, (1908) S. 205—Revision—Collector's powers—Appeal.

49 Mad. 499=A. I. R. 1926 Mad. 480 ; 94 I. C., 164 Overruled.

The Board of Revenue exercises judicial powers and is in that sense a Court as pointed out in 9 Cal. 295 but that does not make it necessarily an inferior Court subject to the High Court as the superior Court. In the absence of any provisions declaring the Board of Revenue to be subject to the appellate jurisdiction of the High Court it must be held that it is not so subject.

Per *Phillips, J.*—If the application of S. 115 C. P. Code gives rise to an anomalous position, it must be inconsistent with the provisions of the Act. The very fact that two Courts would have co-ordinate jurisdiction and would be in a position to pass conflicting orders, both of which would be final, is sufficient to show that the importation of S. 115 is inconsistent with the Act so far as the provisions of S. 205 are concerned : Ayling, J. in 42 Mad. 310, Diss. from.

Per *Odgers, J.*—The Board of Revenue is not a Court with regard to Ch. 11 and its proceedings are not open to revision by the High Court. It could not have been the intention of the legislature that the Board of Revenue which is itself invested with certain revisional powers over the proceedings of its own officers under the Act, should be subject in its turn to the revisional jurisdiction of the High Court ; 42 Mad. 76 ; A.I.R., 1926 Mad. 149 ; A.I.R. 1924 Mad. 119 ; (1925) M.W.N. 489 ; and A.I.R. 1926 Mad. 760 ; Expl. and Disapproved: 3 M.L.W 158 and A.I.R. 1922 Mad. 37 Appr. (Calcutta cases distinguished). (*Phillips, Odgers and Venkataswbba Rao, JJ.*) RAGHUNADHA *v.* GOVINDA. **114 I. C. 161=A. I. R. 1928 Mad. 1032=55 M. L. J. 798.**

—S. 205—Revision—Collector's powers—Appeal.

The powers of the Collector under S. 205 are limited and he cannot go into the weight of the evidence or decide the matter as it was an appeal on the fact to him. (*Kumaraswami Sastry, J.*) KUMARAPPA CHETTIAR v. PODESAL. **102 I. C. 664=25 M.L.W 782=39 M. L. T. 132=1928 M. W. N. 157=A. I. R. 1927 Mad. 667=53 M. L. J. 146.**

—S. 205—Revision.

Board of Revenue and High Court can entertain revision application from an order dismissing an appeal against the order of Revenue Divisional officer on application for enhancement. (*Kumaraswami Sastry, J.*) GOPALA MANNADIAR *v.* PALANI GOUNDAN. **96 I. C. 768=1925 M. W. N. 489.**

—S. 210—Rent suit—Limitation—Limitation Act, Art 116.

A suit for recovery of rent by a landlord under the Madras Estates Land Act is governed by the three years' period of limitation prescribed by Art. 8, Sch. A of the Act. It makes no difference whether the landlord is suing on a registered deed or not. (*Waller, J.*) KALIBA SAHIB *v.* PERIATHAMBIA PILLAI. **100 I. C. 241=A. I. R. 1927 Mad. 439.**

—S. 211—Limitation.

The provisions of the Limitation Act made applicable by S. 211 (2), Madras Estates Land Act, are subject to the operation of S. 210 and the periods limited by the Schedule. (*Pandalai, J.*) CHANDRAMOULESWARA v. PAPAYYA. **119 I.C. 318=30 M.L. W. 412=A. I. R. 1929 Mad. 490=57 M. L. J. 487.**

—S. 212—Damages.

——Tort— Malicious prosecution—Complaint under S. 212.

A suit claiming damages for malicious prosecution in respect of a complaint of an offence under S. 212, Estates Land Act, in which it was alleged that the act amounted to robbery, will not lie, there being no scandal or damage to fair name therein. Plaintiff must prove want of probable and reasonable cause. The tenants cannot be held to be aware of the strictly legal rights of landlord ; 31 M. L. J. 479, Foll. (*Phillips and Odgers, JJ.*) NAGANNA *v.* VENKATARAYULU. **117 I. C. 797=A. I. R. 1929 Mad. 286.**

—S. 212—"Distraint duly made."

The essence of a distraint is the act of taking out of the possession of the real owner, and such act will not be completed, until the taking out of the possession of the real owner is complete. A. I. R. 1925 Mad. 578, Dist. (*Wallace, J.*) SATYANARAYANAMURTHI v. RAMAYYA. **98 I. C. 63=50 Mad. 329=27 Cr. L. J. 1247=1926 M. W. N. 922=24 M. L. W. 441=A. I. R. 1926 Mad. 1143=51 M. L. J. 401.**

—S. 212—Interpretation.

——"Produce".

The word "produce" in S. 212 (b) should be construed as meaning " produce of the land or trees in the defaulter's holding ; it does not include cattle." (*Krishnan, J.*) NARAYANA REDDI *v.* DYNADEENACHAR. **86 I. C. 813=48 Mad. 505=21 M. L. W. 580=26 Cr. L. J. 877=A. I. R. 1925 Mad. 578=48 M. L. J. 215.**

—Sch., Part A, Art. 8—Interpretation.

——"Ascertaining the rent" and "by which the rent is finally ascertained".

The words "ascertaining the rent" and "by which the rent is finally ascertained" must be restricted to the actual rate of rent, and any proceeding necessary to enable the landlord to sue for rent is not included within the words of the Article ; 27 M. L. J. 734, Foll. (*Odgers, J.*) GHULAM GHOUSE SHA *v.* PAKKIRI ROWTHER. **95 I. C. 1014=1926 M. W. N. 385=A.I. R. 1923 Mad. 782.**

—Sch. Part A, Art. 12 and S. 112,

——Action under S. 146 not taken—Maintainability of suit.

The absence of putta and muchilika would be a proper ground for a suit under the Sch. to the Act (Part A-12). But where no such suit is filed and the period allowed by S. 112 is allowed to expire, S. 189 bars the jurisdiction of the Civil Court to entertain such a plea in a suit for possession by purchaser at rent sale, because it is the policy of the Act (1) to compel any person who has acquired an interest in a ryoti tenancy to follow the procedure laid down in S. 146 if he wishes to be treated as a ryot ; and (2) to have all disputes as to procedure in rent-sales enquired into by the Revenue Courts. To allow a person who has not taken action under S. 146, to ignore a rent-sale at the time it is held and subsequently to dispute its validity in a civil suit would run counter to both these principles. S. 189 does allow of such a construction. (*Ayling, O. C. J. and Odgers, J.*) IRULAPPAN SERVAI *v.* VEERAPPAN. **69 I. C. 918=15 M. L. W. 99=31 M. L. T. 71=192 M. W. N. 67=A. I. R. 1921 Mad. 637=42 M. L. J. 113.**

MADRAS FOREST ACT (V of 1882).

—S. 21—Cattle trespass.

A person cannot be said to permit cattle to trespass into a reserve forest, unless he knows that such trespass is likely to be committed and neglects, with such knowledge, to take measures to prevent it. The essence of the offence consists either in misfeasance, as in the case of one wilfully pasturing cattle, or in a

MAD FOREST ACT, (1883), S. 35—Extension of time of permit.

malfeasance as in his neglecting to take proper measures to prevent the cattle trespassing in circumstances from which it may reasonably be inferred that such trespass might have been foreseen or known as the probable consequences of his negligence. The owner of the cattle cannot be found guilty merely because his cattle were found in the reserve forest. But it is not necessary that there should be an overt act on his part to make him guilty.

The onus of proving that he did not "permit" his cattle is not upon the owner. In every case it is for the Magistrate who tries the case to find on the evidence whether the accused by some act or omission or by negligence allowed or permitted the trespass, and if from the prosecution evidence he could presume that the owner failed to take such care as a prudent owner is expected to take, then the onus of proof that he took all reasonable care to prevent cattle trespassing, or that the trespass was in spite of his care, or against his orders, would be on the owner. (*Devadoss and Waller, JJ.*) RAMADAS, *In re.* **96 I. C. 861 = 49 Mad. 875 = 1926 M. W. N. 790 = 27 Cr. L. J. 1005 = A. I. R. 1926 Mad. 1097 = 51 M. L. J. 502.**

—S. 35—Extension of time of permit.

The Central Provinces Government cannot grant passes to authorise the transit of timber, which is already in the Madras Territory. Nor can it extend the time after the expiration of the time fixed in the pass in respect of timber which has reached the Madras Territory already. (*Oldfield and Ramesam, JJ.*) KOTI MALLIKARJUNAYYA *v.* SECY. OF STATE. **70 I.C. 400 = 16 M.L.W. 165 = 1922 M.W.N. 491 = A.I.R. 1922 Mad. 427.**

—S. 55—Compensation.

Offence compounded—Insufficiency of compensation taken is no ground for starting fresh prosecution. (*Devadoss, J.*) LATCHMA NAIK *In re.* **115 I.C. 241 = 1929 M.W.N. 115 = 2 M. Cr. C. 54 = 30 Cr. L.J. 385 = A.I.R. 1929 Mad. 252.**

Under S. 55 it is open to the Forest officer, not only to collect the compensation for the offence on account of the prosecution, but also to collect the value of the timber concerned, which he would be entitled to detain and which would be liable to confiscation in case the prosecution succeeded. (*Oldfield and Ramesam, JJ.*) KOTI MALLIKARJUNAYYA *v.* SECY. OF STATE. **70 I.C. 400 = 16 M.L.W. 165 = 1922 M.W.N. 491 = A.I.R. 1922 Mad. 427.**

—S. 66—Sale on default.

Where a lessee of forest produce had to pay the lease amount in four instalments and defaulted on the second and his property was sold under S. 66, Forest Act,

Held : that the sale was not illegal, 24 M.L.J. 426. Dist. (*Waller, J.*) NATHAR ROWUTHER *v.* SECRETARY OF STATE. **102 I.C. 712 = A.I.R. 1927 Mad. 816.**

MADRAS GENERAL CLAUSES ACT (I of 1891).

—S. 3—Signature.

Under the District Municipalities Act a warrant must bear the signature of the Chairman. Signature must be taken in its accepted sense of sign manual. The fact that in S. 2 (20), C. P. Code, sign is used as including stamp has no bearing on the Madras District Municipalities Act. But if the Chairman happens to be illiterate, under S. 3 (29), Madras General Clauses Act, he may affix his mark. (*Jackson, J.*) D. MADAR SAHIB *v.* EMPEROR. **124 I.C. 139 = 1930 Cr.C. 335 = 31 M.L.W. 205 = 1930 M.W.N. 172 = 3 M.Cr.C. 90 = 31 Cr.L.J. 639 = A.I.R. 1930 Mad. 430 = 58 M.L.J. 193.**

MADRAS HEREDITARY VILLAGE OFFICERS ACT (1895), S. 13—Jurisdiction.

MADRAS HEREDITARY VILLAGE OFFICERS ACT (III of 1859).

—Grant.

Where a woman was appointed, rightly or wrongly, as *karnam* on the death of her minor son, and while she was acting as such, the karnam service *inam* lands were enfranchised and a title-deed was granted to her,

Held : the title-deed conveyed the land to the widow as her own absolute property and that it was not intended to limit her estate to a widow's estate. The last registered holder forms a new stock of descent, and that when an appointment has to be made, the nearest heir to him is preferred provided he is otherwise qualified. After the *inam* is enfranchised the property descends to the heirs of the person named in the title deed, that is, to the person who is registered as holder at the time of enfranchisement. As a result, the woman's own heirs will succeed to her absolute property in preference to the relations of her husband. (*Spencer and Devadoss, JJ.*) ANDUKURI VENKATARAMADAS *v.* PACHIGOLLA GAVARRAJU. **70 I.C. 677 = 16 M.L.W. 228 = 1922 M.W.N. 305 = 31 M L.T. 154 = A.I.R. 1922 Mad. 173 = 43 M.L.J. 153.**

—S. 5—Mortgage.

Unenfranchised service inam—Usufructuary mortgage is void—T. P. Act, S. 43 cannot save such mortgage. (*Ayling and Odgers, JJ.*) SONTYANAGOPALA DASEE *v.* INAPATALUPULA RANI. **64 I.C. 328 = 44 Mad. 946 = 13 M.L.W. 685 = 1921 M.W.N. 385 = A.I.R. 1921 Mad. 410 = 41 M.L.J. 194.**

—S. 5—Transfer.

A transfer of a service inam is not *ab initio* void. But on the vendor resigning the office or on the appointment of his successor, the inam land has to go to the office holder. But on dispossession, the vendee is not liable to account for profits. (*Devadoss, J.*) V. VENKANNA *v.* P. CHINNA APPADA. **86 I.C. 755 = 22 M.L.W. 126 = 1925 M.W.N. 101 = A.I.R. 1925 Mad. 749 = 48 M.L.J. 217.**

—S. 6—Interpretation.

(*Obiter.*) The expression "family" in the Act would have to be construed with special reference to the community with regard to which the question might arise. (*Srinivasa Aiyangar and Jackson, JJ.*) KANTHAVADIVELU *v.* RAMASWAMI. **109 I.C. 661 = 27 M.L.W. 606 = A.I.R. 1928 Mad. 497 = 54 M.L.J. 357.**

—S. 6—Selection.

Duty of selecting a member of the family cast on Collector—No right in family is created—Action of the Collector in not choosing a person from the family is no infringement of the right of the family. (*Srinivasa Aiyangar and Jackson, JJ.*) KANTHAVADIVELU *v.* RAMASWAMI. **109 I.C. 661 = 27 M.L.W. 606 = A.I.R. 1928 Mad. 497 = 54 M.L.J. 357.**

—S. 7—Enquiry.

The charges framed by the Revenue Divisional Officer under S. 7 of Act III of 1895 against a Village Munsif are not a criminal proceeding. (*Ayling, Offg. C. J. and Odgers, J.*) PALANIKUMARA CHINNAYYA, *In re* **66 I.C. 566 = 14 M.L.W. 548 = 1921 M.W.N. 757 = A.I.R. 1922 Mad. 337 = 41 M.L.J. 577.**

—S. 13—Jurisdiction.

Under S. 13, C. P. Code the Collector has jurisdiction to determine whether lands are the emoluments of an office or not, and the parties to the proceeding are debarred by S. 11, C P. Code and the general principles of *res judicata* from re-agitating the same question subsequently in a civil suit, 30 Mad. 320,

MAD. HEREDITARY VILLAGE OFFICERS ACT (1895), S. 13—Jurisdiction.

Foll. (*Anantakrishna Ayyar, J.*) MANIKKAM *v.* CHANDRASEKHARUDU. **31 M.L.W. 537= A.I.R. 1930 Mad. 573=58 M.L.J. 542.**

Revenue Court having jurisdiction—Civil Court cannot consider correctness of decision by revenue Court. (*Anantakrishna Ayyar, J.*) MANIKYAM *v.* CHANDRASEKHARUDU. **31 M.L.W. 537= A.I.R. 1930 Mad. 573=58 M.L.J. 542.**

All suits for the emoluments of an office on the ground that the plaintiff is holding the office must primarily be brought in the revenue Court. The Civil Court has jurisdiction only in one case, *viz.*, where one of the issues is whether the emoluments are land or an assignment of revenue and even that issue has to be decided first by the revenue Court, and only when the relief which the revenue Court can grant is exhausted, that is, when the plaintiff has got a decision that the melwaram constitutes the emoluments, can he sue in the Civil Court for the recovery of the land. 30 Mad. 136, Foll.

Reading Ss. 21 and 13 together the Civil Court has no jurisdiction in the matter of the recovery by an office holder of his emoluments, except in the specific case provided for by proviso (2) to S. 13 (1). (*Wallace and Madhavan Nair, JJ.*) KANDAPPA ACHARI *v.* SINGARA CHARI. **99 I.C. 972= 25 M.L.W. 299=A.I.R. 1927 Mad. 433.**

S. 21 bars the jurisdiction of the Civil Court only where jurisdiction is conferred by S. 13 on the Revenue Court. A Civil Court can therefore entertain a suit respecting the appointment to a newly created village office. The time for such suit begins to run from the date of publication of the Collector's notice. (*Ayling and Coutts-Trotter, JJ.*) TANGUTORI KODANDARAMAYYA *v.* TANGUTORI RAMALINGAYA. **60 I.C. 650=1920 M.W.N. 644=12 L.W. 663.**

An alienee of the emoluments of the office as distinguished from its holder can sue in ordinary Civil Courts for emoluments. The holder of the office alone must sue before the Collector. (33 Mad. 208 Foll.) (*Jackson, J.*) SAHADEVA REDDI *v.* LINGAPPA ASARI. **82 I.C. 942=20 M.L.W. 451=1924 M.W.N. 833= 48 Mad. 781=A.I.R. 1924 Mad. 867.**

—S. 21—Bar to suit.

Where a person sues for the possession of land which is his, whether it be against a trespasser, or against a co-sharer, he does not base his claim on his being the holder of the office, but he bases his claim on his right to the land. The mere fact that it is inam land does not mean that the cause of action is based on his being the holder of the office. S. 21 has to be read along with S. 13. S. 21 does not take away the jurisdiction of a Court to entertain a suit for the recovery of possession of an inam land from a trespasser, or a tenant holding over, or from a co-sharer who in order to defeat the plaintiff, sets up a title in himself and denies the title of the plaintiff. [33 Mad. 208 and 33 Mad. 235 Foll.; 30 Mad. 126, Dist.] A suit for possession of land not based on the fact that the plaintiff is the holder of the office, and that the land is attached to that office, is cognizable by a Civil Court. (*Devadoss and Wallace, JJ.*) YELLAMANDA *v.* CHITAMBARAM. **96 I.C. 7=1926 M.W.N. 355= A.I.R. 1926 Mad. 505=50 M.L.J. 267.**

—S. 21—Jurisdiction.

Section 13 of the Madras Act III of 1895 confers jurisdiction on Revenue Courts over suits for the recovery of the emoluments of hereditary offices falling under Section 3, Clause (4) one of which is the office of village *purohit* or priest in proprietary estates as well as in ryotwari villages. Section 21 ousts the jurisdiction of Civil Courts in respect of such suits. (*Spencer and Ramesam, JJ.*) VANCHINATHA AIYAR *v.* RAJAGOPALA AIYAR. **65 I.C. 321= A.I.R. 1922 Mad. 361= 41 M.L.J. 372.**

MAD. HIGH COURT RULES—Appellate Side Rules, R. 13—Jurisdiction.

—S. 23—Appeal.

The object of the proviso clearly is that it is only against orders of dismissal that the Board will entertain a second appeal, that is, there must be an order of dismissal by the District Collector. Where, therefore, there is no such order passed by the District Collector no second appeal lies to the Board. (*Wallace, J.*) SUBBA RAO *v.* SECY. OF STATE. **31 M.L.W. 113=A.I.R. 1930 Mad. 349= =58 M.L.J. 698.**

Mention of appellate powers only does not carry revisional powers. (*Wallace, J.*) SUBBA RAO *v.* SECY. OF STATE. **31 M. L. W. 113=A.I.R. 1930 Mad. 349= 58 M. L. J. 698.**

The Revenue Board has no inherent power outside the Acts and Regulations to interfere with and enhance the order of suspension passed by the District Collector. (*Wallace, J.*) SUBBA RAO *v.* SECY. OF STATE. **31 M. L. W. 113=A. I. R. 1930 Mad. 349= 58 M. L. J. 698.**

—S. 23—Declaratory suit.

Specific Relief Act, S. 42—S. 42 is not exhaustive.

Declaratory suit by karnam to set aside order passed by Revenue Board is maintainable. 22 Mad. 270 (P. C.) Rel. on ; A. I. R. 1916 P. C. 78, Expl.; 39 Mad. 808; 43 Mad. 410; 39 Mad. 80 ; A. I. R. 1922 Mad. 290; 39 M. L. J. 319 and 43 Mad. 4, Ref. (*Wallace, J.*) SUBBA RAO *v.* SECY. OF STATE. **31 M. L. W. 113= A. I. R. 1930 Mad. 349=58 M. L J. 698.**

MADRAS HIGH COURT RULES.

Appellate Side Rules.
Civil Rules of Practice.
Criminal Rules of Practice.
Fees Rules.
Insolvency Rules.
Original Side Rules.

APPELLATE SIDE RULES.

R. 4—Vacation Judge.

The powers of the Vacation Judge are not to be looked for in the notification, as though it were a self-contained and exhaustive advertisement to the public of their scope and nature. For it need not and must not be regarded as more than a general statement of the powers, which the Vacation Judge ordinarily will exercise, and cannot be read as derogating from those, which by virtue of Statute and Rules, he possesses and of which he cannot, consistently with them, be deprived. (*Oldfield and Devadoss, JJ.*) KUNHAHAMAD HAJI *v.* EMPEROR. **72 I. C. 599= 46 Mad. 382=24 Cr. L. J. 439= 1923 M. W. N. 94= A. I. R. 1923 Mad. 426= 44 M. L. J. 450.**

—R. 13—Jurisdiction.

Srinivasa Aiyangar, J. (*Contra*). Although the insolvency jurisdiction of the High Court is always treated as a separate Court presided over by one of the Judges of the High Court, the fact that appeals lie from the decision of the presiding Judge to the High Court, and the fact that S. 15 of the High Courts Act invests the High Court with the power of superintendence over all Courts which are subject to its appellate jurisdiction do not necessarily make it a subordinate Court, any more than the Original Side Court or an Admission Court, from which appeals lie under the Letters Patent against the decision of a single Judge, can be described as subordinate to the

MAD. HIGH COURT RULES—Appellate Side Rules, R. 20—Clerical error.

rest of the High Court; and therefore R. 13 of the Appellate Side Rules, Chapter III, which states that Advocates, Vakils and Attorneys of the High Court are entitled to practise in any of the Courts subordinate to the High Court has no application. (*Spencer, Offg. C. J., Devadoss and Srinivasa Aiyangar, JJ.*) KRISHNASWAMI AIYAR *v.* SWAMINATHA AIYAR.
85 I. C. 1025=48 Mad. 331=A. I. R. 1925 Mad. 385=48 M. L. J. 36 (F.B.)

—R. 20—Clerical error.

Error committed in the course of clerical duty is clerical error—Pleader's clerk omitting name of important party from cause-title by mistake—Mistake was allowed to be corrected—Words. (*Srinivasa Ayyangar and Reilly, JJ.*) SUTHARSANA *v.* SAMARAPURI. **110 I. C. 837=1928 M. W. N. 634=A. I. R. 1928 Mad. 690.**

—R. 23—Proviso—Validity of.

———*Proviso is* ultra vires.

The proviso to R. 23 of the Appellate Side Rules is *intra vires* and does not in any way conflict with anything that is contained in the Civil Procedure Code. (*Devadoss, J.*) *In re* THE MATTER OF A VAKALATH. **109 I. C. 206=A. I. R. 1928 Mad. 472.**

—R. 31—Consolidation.

Court has no inherent jurisdiction to consolidate appeals in cases disposed of by single judgment of the lower Court so as to enable the appellant to pay court-fee on the value of the consolidated appeals and file one vakalat. 109 I. C. 651=A. I. R. 1928 Mad. 468, Overruled. 29 Cal. 140 and 34 M. L. J. 279, Dist. (*Kumaraswamy Sastri, Curgenven and Walsh, JJ.*) GOVIND KRISHNAYACHANDRULU, *In re*. **123 I.C. 203=53 Mad. 248=31 M. L. W. 282=A. I. R. 1930 Mad. 376=58 M. L. J. 510 (F. B.).**

Court Fees Act, Sch. II, Art. 10—Appeals consolidated—One vakalatnama is sufficient but copies of all decrees properly stamped must be filed—Though production of judgment in all but one appeal might be dispensed with. C. R. Ps. 1517 to 1519 of 1927 and 34 M.L.J. 279, Rel. on. (*Devadoss, J.*) PERUMAL NADAR *In re*. **109 I. C. 651=1928 M.W.N. 271=27 M.L.W. 366=A.I.R. 1928 Mad. 463=54 M.L.J. 595.**

CIVIL RULES OF PRACTICE.

—Validity of.

Quaere.—It is doubtful if note (ii) to R. 30 in Legal Practitioners Rules is strictly correct. (*Ramesam, J.*) A. V. SUBBA RAO, *In re*. **122 I.C. 799=30 M.L.W. 977=A.I.R. 1930 Mad. 413=57 M.L.J. 780.**

—R. 14—Pauper application.

Rule 14 of the Civil Rules of Practice is not *ultra vires*. Presentation of pauper application to the Sheristadar is valid. The insistence in Rule 3 is on the words 'in person' and not on 'to the Court' as meaning the Judge himself. (*Jackson, J.*) MU. CHIDAMBARAM CHETTIAR *v.* C. K. KADAR MOHIDEEN ROWTHER. **84 I.C. 968=20 M.L.W. 622=1924 M.W.N. 749=48 Mad. 785=A.I.R. 1924 Mad. 901=47 M.L.J. 522.**

—R. 20—Counsel in connected suits.

R. 20 is confined to conduct of pleader in suit or connected proceedings—Connexion must be direct. A.I.R. 1921 Mad. 666, Dist. (*Jackson, J.*) D. B. VEDAVALLI AMMAL *v.* K. S. GANPATHY IYER. **A.I.R. 1930 Mad. 626.**

A counsel ought not to accept a brief in any case in which he would be embarrassed in the discharge of his duty by reason of the confidence reposed in him by the other party in a previous though unconnected case, and if his embarrassment is self-evident and his action an obivious scandal, it can be brought before the General Council of the Bar. (*Jackson, J.*) D. B. VEDAVALLI AMMAL *v.* K. S. GANPATHY IYER. **A.I.R. 1930 Mad. 626.**

MAD. HIGH COURT RULES—Civil Rules of Practice, R. 67—Form of Application.

—R. 24—Abuse.

A Court is not justified in depriving a party of the benefits of his decree, on the bare ground that he has failed to comply with some rule of procedure. A.I.R. 1924 P. C. 198, Rel. on.

If the Court purports to prevent an abuse it must find what the abuse is. S. 151 is not a general clause validating every act of a Court which cannot otherwise be justified. It is a section allowing a Court to exercise its power in specified circumstances, and it cannot exercise that power until those circumstances are established. Mere failure to comply with R. 24 of the Civil Rules of Practice is hardly in every case an abuse of process. (*Srinivasa Ayyangar and Jackson, JJ.*) ALLURI TIMMARAJU *v.* ALLURI NARASIMHA RAJU. **109 I.C. 528=1928 M.W.N. 222=28 M.L.W. 152=A.I.R. 1928 Mad. 522=54 M.L.J. 665.**

—R. 36—Application of.

R. 36 which prescribes the fee to be paid by a person who has got leave to inspect documents, applies as well to the case of a party to the suit who gets leave under R. 32, as to the case of a stranger who gets leave under Rr. 33 to 36. (*Coleridge, J.*) APPARAO *v.* GOVERNMENT PLEADER. **74 I.C. 944=1923 M.W.N. 720=A.I.R. 1924 Mad. 242=45 M.L.J. 721.**

—R. 64—Construction.

Reilly, J.—It is desirable that R. 64 of the Madras High Court Civil Rules of Practice and Rr. 1 and 2, O. 13, C. P. Code should be brought into accord with each other by amendment. (*Kumaraswamy Sastri and Reilly, JJ.*) RAMASWAMY CHETTIAR *v.* TYAGARAJA PILLAI. **110 I. C. 16=27 M. L. W. 520=51 Mad. 472=A. I. R. 1928 Mad. 516=55 M. L. J. 34.**

—R. 64—Production of documents.

C. P. Code, O. 13, R. 1—Documents sought to be put in at the hearing—Documents consisting of certified copies of decrees and registered documents—No orders passed under O. 13, R. 1 (or R. 64)—Court should not reject the application for receiving the documents. (*Kumaraswami Sastri and Reilly, JJ.*) RAMASWAMY CHETTIAR *v.* TYAGARAJA PILLAI. **110 I. C. 16=27 M. L. W. 520=51 Mad. 472=A. I. R. 1928 Mad. 516=55 M. L. J. 34.**

C. P. Code, O. 13, Rr. 1 and 2—Documents produced by defendant after settlement of issues but at early stage of suit—Allegation in affidavit that documents could not be found earlier—No-counter-affidavit by plaintiff—Summary rejection is improper and is revisable by High Court.

R. 64 of the Civil Rules of Practice made by the Madras High Court indicates that the documents should be called for on some date fixed by the Court for such documents being produced and left in the Court. (*Srinivasa Aiyangar, J.*) CHIDAMBARA CHETTIAR *v.* PARVATHI ACHI. **87 I. C. 351=A. I. R. 1925 Mad. 744.**

—R. 67—Form of application.

Judgment-debtor made an application asking for dismissal of decree-holder's execution application, a form of prayer which is obnoxious to Rr. 67 and 176.

Held: that if there was a real grievance to be redressed the mere fact that the application was not couched in the proper form ought not to stand in the way of redress. (*Pandalai, J.*) (BADAM) SESHAYYA

MAD. HIGH COURT RULES—Civil Rules of Practice, R. 80—Application.

v. (GRANDHI) SATHIRAJU. 120 I. C. 863= A. I. R. 1930 Mad. 414.

—R. 80—Application.

No order sanctioning a sale to the prejudice of contributors or creditors shall be made *ex parte* on the application of the Official Liquidator. (*Ayling and Krishnan, JJ.*) GORDHAN DAS CHUNI LAL DAKUWALA *v.* T. SRIMAN KANTHIMATHINATHA PILLAI 97 I.C. 295=24 M.L.W. 35=A. I. R. 1921 Mad. 286.

—Rr. 131, 132 and 133—Delay in payment.

It is not reasonable to hold that a person is guilty of negligence when he would, in the ordinary course of things, have arrived in time for payment and where delay of five minutes was due to an accident which he could by no means have foreseen. (46 Mad. 60, Foll.) (*Kumaraswami Sastri, J.*) GOPALA KRISHNA PILLAI *v.* KUNJITHAPATHAM PILLAI. 79 I.C. 651=47 Mad. 543=18 M.L.W. 844= 33 M.L.T. 106=1923 M.W.N. 811= A.I.R. 1924 Mad. 324=45 M.L.J. 849.

—R. 161 (a)—Execution—Proper Court.

Transferee Court returning decree to parent Court according to R. 161 (*a*) after six months—Application made to transferee Court after return, is not made to "proper Court" and does not save limitation. Remarks of Seshagiri Iyer, J., in 39 Mad. 485, Disappr. (*Ramesam, J.*) MIR MD. NOORULLA *v.* KIBULAI SAYYAD GHULAM. 98 I.C. 455= A.I.R. 1926 Mad. 1209=51 M.L.J. 554.

—R. 161 (a)—Scope.

R. 161 (*a*) is only a rule of detail giving further guidance to Court in the carrying out of the provisions of S. 41, C. P. Code, and the two provisions are not inconsistent with each other, nor is R. 161 (*a*) *ultra vires.*

All the rules of the Rules of Practice are supplemental to the C. P. Code, R. 161 (*a*) is a rule within the power of the High Court, the object being to compel decree-holders to be prompt in filing execution petitions in Courts to which the decrees are transferred. 20 All. 129 and A.I.R. 1923 Bom. 396, Dist. (*Ramesam, J.*) MIR MAHOMED NOORULLA *v.* KIBULAI SAYYAD GHULAM. 98 I.C. 455= A.I.R. 1926 Mad. 1209=51 M.L.J. 554.

—R. 179—Validity of.

Per *Sadasiva Iyer, J.*—Those portions of Rules 179 and 180 of the Civil Rules of Practice which require that the Court should proceed in certain cases mentioned in R. 179 as if the decree-holder was an assignee of the judgment-debtor and require in certain cases mentioned in R. 180 that "the execution petition shall ask that the decree may be transmitted to the custody Court" are *ultra vires.* (*Wallis, C. J., Ayling, Sadasiva Iyer, Napier and Krishnan, JJ.*) VISVANADHAN CHETTI *v.* ARUNACHALAM CHETTI. 60 I.C. 302=44 Mad. 100=1921 M.W.N. 14= A.I.R. 1921 Mad. 218 (F.B.)

—R. 184—Application of.

C. P. Code, O. 20, R. 15—Partners hypothecating shares in partnership—Creditor obtaining money decree—Partners suing to recover their share in partnership and obtaining preliminary decree directing taking of accounts—Preliminary decree being only declaratory could not affect creditor's right to sell partners' interest in partnership under their prior money decree—Neither C. P. Code, O. 21, R. 53, nor R. 184, Civil Rules of Practice can apply to such cases. 34 Mad. 442, Rel. on. (*Kumaraswami Sastri, Ramesam and Reilly, JJ.*) DHANARAJU *v.* MOTILAL DAGA. 116 I.C. 343=29 M.L.W. 823=52 Mad. 563= A.I.R. 1929 Mad. 641=57 M.L.J. 264 (F.B.).

MAD. HIGH COURT RULES—Civil Rules of Practice, R. 277—Legal Practitioner.

Per *Thiruvenkatachariar, J.*—R. 184 is invalid under the present Code, in so far as it prohibits sales of decrees other than those which are dealt with by R. 53 (1) in execution of another decree. (*Kumaraswami Sastri, Ramesam and Reilly, JJ.*) DHANARAJU *v.* MOTILAL DAGA. 116 I.C. 343= 52 Mad. 563=29 M.L.W. 823= A.I.R. 1929 Mad. 641=57 M.L.J. 264 (F.B.).

—R. 277—Legal Practitioner.

Rule 277 is intended to regulate the proceedings in Courts and a practitioner of the Court has to conform to the rules governing its procedure. If he does not conform to the rules governing the procedure he cannot claim a right of audience in that Court. A pleader can appear for a party whose interest is opposed to that of the party for whom he had acted, drawn up pleadings or appeared in the same proceedings either with the latter's consent or when especially authorized by the Court. The rule contains a prohibition against the pleader's appearance unless the conditions therein laid down are satisfied. The object of the rule is not to save the pleader from a suit for damages by the party for whom he acted and against whom he subsequently acted, but to prevent an unreasonable conduct on the part of the party who engaged the pleader's services and afterwards gave him up without proper grounds. If a party who gets advice from a pleader does not choose to engage his services for the conduct of the suit, but engages another, the pleader is not altogether debarred from accepting an engagement from the opposite party, but he could do so by giving the former an opportunity to engage his services, and if he refuses to engage his services and unreasonably withholds his consent, he may appear for the latter with the special authority of the Court. It is to prevent unfair dealing by the parties that the Court is invested with the power to grant special authority to a pleader to appear against the party to whom he gave advice or acted or appeared at for an early stage of the proceedings. But for such power, any rich party or an unscrupulous client might prevent all leading pleaders from appearing for his opponent by seeking their advice by paying a nominal fee and then engage the services of one or more of them to conduct the proceedings in Courts. The words "in any matter connected therewith" mean connected with the suit or appeal or other proceeding in which the pleader gave the advice and does not refer to subsequent suit, appeal or proceeding after the termination of the former suit, appeal or proceeding. Where the causes of action in the two are different, the subsequent suit or proceeding or matter can be said to be connected with the previous suit or proceeding only if the former flows from or in consequence of the previous suit or proceeding. Otherwise there is no connexion at all. If the plaintiff sues the defendant for possession of land on his title and succeeds, and some time after brings a suit upon a fresh cause of action against the same defendant, there is no connexion between the two suits though the defendant may raise the question of title of the plaintiff. (*Devadoss and Wallace, JJ.*) VEERAPPA CHETTIAR *v.* SUNDARESA SASTRIGAL. 92 I.C. 300= 48 Mad. 676=22 M.L.W. 606= A.I.R. 1925 Mad. 1201=49 M.L.J. 366.

It is an elementary principle of professional ethics that it is not proper for a legal adviser to use knowledge obtained in one case to the detriment of his client in another case. Where there is a danger of that occurring in any case it can only be avoided by not

MAD.HIGH COURT RULES—Civil Rules of Practice R. 278—Costs.

allowing the Pleader to accept the later engagement or to act thereunder.

In interpreting a rule of the Madras High Court one need not look beyond the language of that rule. The words of R. 277 are wide enough to include a subsequent suit if it is connected with the earlier one and two suits will ordinarily be considered connected if they have any issue in common or involve substantially a determination of the same question of fact or the same mixed question of law and fact. If the High Court Circular 679 of 1869, which is printed as a footnote to R. 277 in the Civil Rules of Practice purported to lay down anything contrary to the rule itself, Courts will decline to be guided by it. (*Spencer and Ramesam, JJ.*) RAMAKRISHNA PILLAI *v.* S. A. BALAKRISHNA AIYAR. **62 I. C. 712=13 M. L. W. 541=1921 M. W. N. 646=A. I. R. 1921 Mad. 666=41 M. L. J. 60.**

—R. 278—Costs.

Where a suit has been dismissed for default of payment of stamp duty, and there has been no trial of the suit, although the pleadings were filed and issues framed, the case would come under R. 278 (*b*) of the Civil Rules of Practice. The fees in such a case should be calculated in accordance with that rule and not as if the suit had been dismissed after contest. (*Phillips, J.*) VENKAYYA GARU *v.* B. SATYANARAYANAMURTHI. **91 I.C. 303=22 M. L. W. 208=A. I. R. 1925 Mad. 1235=49 M. L. J. 271.**

—Appendix A, Note 2—Fees.

The fee that has to be paid on an application for the emergent issue of process for arrest, in a Munsif's Court, is one and a half times the ordinary fee. The ordinary fee includes the extra amount that has to be paid for any detention beyond the prescribed period of three days under the rule. (*Krishnan, J.*) VENKATRAMA AIYAR *v.* EMPEROR. **90 I. C. 616=22 M.L.W. 327=1925 M. W. N. 606=A. I. R. 1925 Mad. 1236=49 M.L.J. 440.**

CRIMINAL RULES OF PRACTICE.

—R. 161—Memo of appearance.

Vakalat need not be filed—Memo of appearance is sufficient. (*Wallace, J.*) MANIKONDA LINGAYYA *v.* EMPEROR. **75 I. C. 985=18 M. L. W. 960=33 M. L. T. 224=1924 M. W. N. 51=25 Cr. L. J. 73=A. I. R. 1924 Mad. 192=45 M. L. J. 683.**

—R. 195—Confessions.

Rule 195 is not a rule of law, but merely a rule for the guidance of Village Magistrates and, therefore, a confession recorded by a Village Magistrate after the police investigation has begun is admissible apart from the fact whether the Magistrate knew that the investigation had begun. (*Ramesam and Jackson, JJ.*) KUPPATHAN *v.* EMPEROR. **105 I. C. 667=1927 M. W. N. 824=28 Cr. L. J. 955=9 A. I. Cr. R. 148=A. I. R. 1927 Mad. 974=53 M. L. J. 739.**

—R. 196 (2)—Confessions.

Where the Magistrate, before recording a confession, asked the accused: "Do you understand that you are at liberty to make a confession or not as you like, and are you aware that there is no necessity or ompulsion on you to make any such statement or confession which may be used in evidence against you?"

Held: that the question satisfied the spirit of R. 196 (2). The specimens of questions suggested in the Criminal Rules of Practice seem to be leading questions suggesting torture or other ill-treatment by the police, and it seems to be undesirable to put such questions in the form mentioned in the rule. The whole object and policy of R. 196 is that a Magistrate should satisfy himself that there is no compulsion by the police or ill-treatment so as to raise the suspicion that the statement of the accused is not a voluntary statement, and so long as the spirit of the rule is satisfied it is undesirable that questions should be put in this form showing a total want of trust in the police. (*Ramesan and Jackson, JJ.*) KUPPATHAN *v.* KING-EMPEROR. **105 I.C. 667=1927 M.W.N. 824=28 Cr. L.J. 955=9 A.I. Cr. R. 148=A.I.R. 1927 Mad. 974=53 M.L.J. 739.**

MAD. HIGH COURT RULES—Fees Rules, O. 6, R. 1—Interpretation.

FEES RULES.

—Exemption from Court-fees.

C.P. Code, S. 92—Suits under, are not exempt from Court-fees, (*Beasley, J.*) SWAMINATHA AIYAR *v.* GURUSWAMI MUDALIAR. **105 I.C. 119=26 M.L.W.378=A.I.R. 1927 Mad. 940=53 M.L.J. 457.**

—R. 38—Fees of Government Pleader.

Fees of Government Pleader should be fixed according to time taken for the work. (*Schwabe, C. J., Oldfield and Coutts-Trotter, JJ.*) SECY. B. OF REV. *v.* MD. S. HUSSAIN MEAH SAHIB AND CO. **68 I.C. 655=45 Mad. 977=16 M.L.W. 333=1922 M.W.N. 583=A.I.R. 1923 Mad. 34=43 M.L.J. 434.**

—R. 41—Construction of.

The proper construction of R. 41 of the High Court Appellate Side Fee Rules is that "Original Side" means the Original Side when exercising the jurisdiction referred to, in the preamble to the Original Side Rules, and it was not intended to have and has no application at all to insolvency. That being so, the privileges under R. 41 extend to appeals from insolvency. (*Schwabe, C. J. and Ramesam, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* OFFICIAL ASSIGNEE OF RANGOON. **83 I.C. 174=34 M.L.T. 99=1924 M.W.N. 458=A.I.R. 1924 Mad. 662=46 M.L.J. 580.**

—O. 2, R. 2. (2)—Construction.

The Court-fees rule only says that no fee shall be levied by the Registrar, which means, no fee shall be levied by him (taking the case of a plaint) at the time of its being filed. But this does not say that the pauper litigant cannot be directed to pay the Government, at the termination of the suit, Court-fees, which he was excused from paying at the outset. The Court-fee rule speaks of levying a Court-fee, by a Registrar; whereas the rules in the Code deal with payment of Court-fees in connection with costs incurred in the course of litigation, so there is no inconsistency between the Court-fee rule in question and O. 33, Rr. 10 and 11, C.P. Code. (*Venkatasubba Rao, J.*) YELUMALAI *v.* KUPPAMMAL. **109 I.C. 173=27 M.L.W. 760=A.I.R. 1928 Mad. 385=54 M.L.J. 263.**

—O. 6, R. 1—Interpretation.

"Disposed of" means adjudication after trial. A. I. R. 1926 Mad. 1214, Foll. (*Ramesam and Cornish, JJ.*) SUBRAMANIAN *v.* APPADURAI MUDALI. **123 I.C. 578=31 M.L.W. 70=A.I.R. 1930 Mad. 540.**

—O.6, R. 1.—Interpretation,

———*Dispose.*

The expression "disposed of" in Cl. (*c*) should be construed as meaning a disposal by an adjudication made by the Court itself on the merits of the case and not a disposal based on any agreement between the parties, such as settlement, withdrawal or compromise.

Where a case came on for settlement of issues and the defendants intimated that they were not pressing

MAD. HIGH COURT RULES—Fees Rules, O. 6, R. 1—Scope.

their defence and thereupon the Court took it that the case should be posted for final disposal and on the day of final disposal the parties agreed and a decree was passed :

Held : that the case clearly fell under Cl. (*b*). (*Srinivasa Iyengar, J.*) OFFG. TRUSTEE *v.* KAMALAMMAH. **98 I.C. 876=24 M.L.W. 808=1926 M.W.N. 887=A.I.R. 1926 Mad. 1214.**

—O. 6, R. 1—Scope.

Where there is a confession of judgment, Cl. (*b*) applies, and this clause is not confined to cases which have not reached the final disposal. (*Ramesam and Cornish, JJ.*) SUBRAMANIAN *v.* APPADURAI MUDALI. **123 I. C. 578=31 M. L. W. 70=A.I.R. 1930 Mad. 540.**

—O. 6, R. 20—Itemised bill.

There is no provision under the Fees Rules by which an application under S. 45, Specific Relief Act, will entitle an advocate not appearing by attorney to bring in an itemised bill charging for attendance and various other matters as if the advocate himself was both attorney and advocate. (*Kumaraswami Sastri, J.*) UNITED INDIA LIFE INSURANCE CO., LTD. *In the matter of.* **117 I. C. 301=29 M.L.W. 632=A.I.R. 1929 Mad. 146=56 M.L.J. 79.**

INSOLVENCY RULES.

—R. 133—Fees.

In all insolvency proceedings unless an order is made to the contrary the rule is to tax half the Attorney's fees. (*Schwabe, C. J. and Wallace, J.*) OFFICIAL ASSIGNEE, MADRAS *v.* DORAIAPPA.

71 I. C. 1056=17 M.L.W. 350=32 M.L.T. 172=1923 M.W.N. 359=A.I.R. 1923 Mad. 484=44 M.L.J. 411.

—O. 3, R. 26—" Service of order."

Knowledge on the part of the insolvent of the order of adjudication cannot be a substitute for "service of the order" within R. 26. (*Coutts-Trotter, C. J. and Ramesam, J.*) DORAISWAMI *v.* OFFICIAL ASSIGNEE OF MADRAS. **95 I. C. 44=1926 M.W.N. 58=A.I.R. 1926 Mad. 246=51 M.L.J. 130.**

ORIGINAL SIDE RULES.

—Accounts.

In a suit for accounts on the Original Side the Official Referee has jurisdiction to enquire and report as to the quality of goods contracted and despatched and as to whether certain title-deeds were deposited by plaintiff with defendant for safe custody or as security. (*Krishnan and Venkatasubba Rao, JJ.*) KANNI CHETTI *v.* RAJU CHETTY.

95 I. C. 436=A.I.R. 1926 Mad. 879.

The Court at the instance of the attorney engaged by a party has jurisdiction to declare the costs due to him to be a charge on the property purchased in Court auction, on being satisfied that the party is attempting to defeat the claims of the attorney. Where a party executed a vakalat, by which he agreed to pay the attorney the regulation fees and stated that there was no counter-agreement between him and the attorney,

Held, it is not open to the party to plead that he never engaged the attorney and never agreed to pay him any amount. 25 Cal. 887, Foll. (*Kumaraswami Sastri, J.*) ARUNACHALA AIYAR, *In re.* **81 I. C. 732=19 M.L.W. 576=A.I.R.1924 Mad. 793.**

—Practice.

It would be a novel and a dangerous proposition to hold that the Rules of Practice in English Courts apply *en bloc* to the Original Side except in so far as the High Court Rules modify them. (*Kumaraswami Sastri, J.*) ABDUL WAHAB *v.* ROKIA BIBI SAHIBA.

MAD. HIGH COURT RULES—Original Side Rules, O. 6-A,—Scope of.

73 I. C. 903=A. I. R. 1924 Mad. 405.

—Written Statement.

Where the vakil refuses to file the written statement or to consent to transfer the case to another vakil because he has not received his fees, his action is illegal and the party cannot be made responsible for the delay in filing the written statement. (*Wallis, C. J. and Krishnan, J.*) MUTHU KRISHNA YACHENDRA BAHADUR *v.* W. H. NURSE.

69 I. C. 695=44 Mad. 978=14 M. L. W. 154=1921 M.W.N. 562=A. I. R. 1921 Mad. 320=41 M. L. J. 213.

—R. 63-A—Hundis.

Rule 63-A covers all negotiable instruments including Shah Jog Hundi notwithstanding any restrictions on negotiability. Acknowledgment with promise to pay may be negotiable. (*Schwabe, C. J. and Coutts-Trotter, J.*) KANLAL BHOYA *v.* BALARAM PARAMASUKDOSS.

68 I. C. 921=16 M. L. W. 608=31 M. L. T. 284=A. I. R. 1923 Mad. 44=43 M. L. J. 480.

—R. 20C—Appeal.

Order of Judge under—Is ministerial and not a judgment—No appeal lies from such an order. (*Schwabe, C. J. and Krishnan, J.*) T. R. TAWKER AND SONS *v.* HARSOOKDOSS CHOUGHMULL. **76 I. C. 124=18 M.L.W. 647=33 M.L.T. 72=1923 M.W.N. 834=A. I. R. 1924 Mad. 386=45 M. L. J. 611.**

—O. 5-A—Procedure.

Procedure does not apply to claims for damages but applies only to claims to indemnity. (*Venkatasubba Rao, J.*) KRISHNASWAMI IYER *v.* RAGHAVIAH CHETTY. **107 I.C. 423=39 M.L.T. 472=26 M.L.W. 687=A.I.R. 1928 Mad. 43=53 M.L.J. 679.**

—O. 5-A—Third party proceedings.

The very object of the third party procedure is to prevent multiplicity of actions, but if the third party proceedings will prejudice, embarrass or delay the plaintiff, the Court may refuse to give directions. Also the Court may refuse to adopt this procedure where the whole dispute between the defendant and third party cannot be disposed of in the action itself. The Court, however, will not refuse to apply the procedure merely because the case raises a question of some difficulty : Eastern Shipping Co. *v.* Quah Beng Kee, (1924) A. C. 177, Rel. on. (*Venkatasubba Rao, J.*) KRISHNASWAMI IYER *v.* RAGHAVIAH CHETTY. **107 I.C. 423=39 M.L.T. 472=26 M.L.W. 687=A.I.R. 1928 Mad. 43=53 M.L.J. 679.**

—O. 5-A, R. 1—Notice .

Court closing shortly after introduction of new rules—Application made next day after reopening—Delay was rightly excused. (*Venkatasubba Rao, J.*) KRISHNASWAMI IYER *v.* RAGHAVIAH CHETTY. **107 I.C. 423=39 M.L.T. 472=26 M.L.W. 687=A.I.R. 1928 Mad. 43=53 M.L.J. 679.**

—O. 6, R. 4—Revival of Suit.

Suit dismissed under O. 6, R. 4 for want of prosecution—Application for restoration made after 30 days—Master can revive suit even after prescribed period. *Shafer v. Blythe*, (1920) 3 K. B. 140 and *Badshaw v. Warlow*, 32 Ch. D. 403, Rel. on ; *Whistler v. Hancock*, 3 Q. B. 38 and *King v. Devenport* 4 Q.B.D. 402, Not Foll. (*Coutts-Trotter, C.J., Ramesam and Reilly, JJ.*) NARAYANASWAMI NAICKER *v.* SAKKARAM RAO. **113 I.C. 660=29 M.L.W. 97=A.I.R. 1929 Mad. 2=52 Mad. 186=55 M.L.J. 838 (F.B.)**

—O. 6-A—Scope of.

A suit on a negotiable instrument by or against a

MAD. HIGH COURT RULES—Original Side Rules, O. 14-A—Official Referee.

legal representative is still a suit on the instrument and will fall under O. 6-A. If the liability sought to be enforced is solely under the instrument it would not matter whether it is sought to be enforced against a party to the instrument or a legal representative of such a party, such as an executor, or administrator, or heir of his. (*Coutts-Trotter, C.J., Krishnan and Beasley, JJ.*) VENKATARAYANIM VARU *v.* W. H. NURSE. **99 I.C. 464=49 Mad. 815=24 M.L.W. 704=A.I.R. 1927 Mad. 34=51 M.L.J. 716 (F.B.).**

A plaintiff suing on a negotiable instrument on the Original Side of the High Court must bring his suit in the summary form and there is no option to bring his suit in the ordinary form. (*Coutts-Trotter, C.J., Krishnan and Beasley, JJ.*) VENKATARAYANIM *v.* W. H. NURSE. **99 I.C. 464=49 Mad. 815=24 M.L.W. 704=A.I.R. 1927 Mad. 34=51 M.L.J. 716 (F.B.).**

R. 63 is one of procedure and does not affect substantive rights—C. P. Code, O. 37 and S. 122. (*Coutts-Trotter, C.J., Krishnan and Beasley, JJ.*) VENKATARAYANIM VARU *v.* W. H. NURSE. **99 I.C. 464=49 Mad. 815=24 M.L.W. 704=A.I.R. 1927 Mad. 34=51 M.L.J. 716 (F.B.).**

—O. 14-A—Official Referee.

The Official Referee has no power to decide questions as to the terms of partnership, its duration or the shares of the partners. There are no provisions about his powers in the Code or in the Original Side Rules analogous to O. 36 of the Rules of the Supreme Court which deals with Referees and O. 55 which deals with the powers and duties of Masters. There is no statute constituting the office of the Official Referee, and his powers have therefore to be determined with reference to the provisions of the Civil Procedure Code and the Original Side Rules. The rules do not confer on the Official Referee any higher powers than those conferred on the Commissioners. The Official Referee is only a permanent Commissioner whose duty is to take accounts and make enquiries contemplated by the Code and the Rules. The function of the Court in such cases is to determine the rights of the parties where the rights of the parties or the terms of the partnership are disputed and to decide in what manner and from what date accounts have to be taken. The function of the Official Referee is to take accounts, having regard to the declarations of the rights of the parties made by the Judge in passing the preliminary decree and his powers to deal with the questions are not limited simply to matters of arithmetic but he has for the purposes of carrying into effect the directions given by the Judge in the preliminary decree and for the purpose of arriving at conclusions as to the state of accounts between the parties, power to take evidence and deal with matters auxiliary thereto. He is not a Judge of the Court but only a Commissioner and the adjudication by him of these questions which under the Code and the Rules form part of the functions of a Judge would be *ultra vires*. (*Kumaraswami Sastri, J.*) ABDUL WAHAB SAHIB *v.* M. ROKIA BIBIA SAHIBA. **73 I.C. 903=A.I.R. 1924 Mad. 406.**

—O. 24-A—Form 28—Original Side Rules—Sale.

Form 28—Sale by Official Referee—Sale proclamation should mention place of sale—But non-mention is no ground for setting aside sale when it has not caused damage—C. P. Code O. 21, R. 90. (*Wallis, C. J. and Krishnan, J.*) TULJARAM ROW *v.* RAMACHANDRA ROW. **68 I.C. 916=14 M.L.W. 515=1921 M.W.N. 736=A. I. R. 1921 Mad. 484=41 M.L.J. 465.**

MAD. HINDU REL. ENDMTS. ACT. (1925) S. 63—Applicability.

—O. 29, R. 6—Bidding at execution sale.

Decree-holder cannot bid for less than market value except with an order of the court. (*Reilly and Cornish, JJ.*) A. C. ABDUL AZEEZ SAHIB *v.* BUNDER MULL SOWCAR. **1930 M.W.N. 103=A.I.R. 1930 Mad. 559.**

—O. 38, R. 7—Award.

Arbitration Act, S. 11, Sub-Cl. (2)—Written submission to arbitration not filed with award—Award not signed by all arbitrators—Award cannot be made a rule of Court either under the Arbitration Act or under Sch. II, C.P. Code. (*Kumaraswami Sastri, J.*) NEMI CHAND SOWCAR *v.* KESARIMULL SOWCAR. **114 I.C. 818=29 M.L.W. 227=A.I.R. 1929 Mad. 31=56 M.L.J. 35.**

—App. II, Nos. 35 and 36—Probate Suit.

A decision in a contentious probate suit is a final judgment, so that a memorandum of appeal from it comes under serial No. 35 of Appendix II "of the Original Side Rules as being from a" final judgment. To constitute an order a final judgment nothing more is necessary than that there should be a proper *litis contestatio* and a final adjudication between the parties to it on the merits. A judgment is a decision obtained in action and every other decision is an order. (*Schwabe, C. J.*) PERUMAL CHETTY *v.* KANDASWAMY. **72 I.C. 925=46 Mad. 592=17 M.L.W. 238=1923 M.W.N. 160=32 M.L.T. 122=A.I.R. 1923 Mad. 362=44 M.L.J. 146.**

—Appendix II, Art. 6—Court-fee.

An appeal against a final judgment should be taxed with a fee of Rs. 150 and appeals against interlocutory judgments or orders whether final or interlocutory, should be taxed with a fee of Rs. 100. (*Coutts-Trotter, J.*) H. MAHOMED ISHAQ SAHIB *v.* MAHOMED MOIDEEN. **70 I.C. 813=45 Mad. 849=1922 M.W.N. 511=16 M.L.W. 210=A.I.R. 1922 Mad. 421=43 M.L.J. 436.**

MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (1 of 1925).

—Sanction.

Where the plaintiff is not suing for the vindication of any public right, but his suit is confined to a vindication of his own private right to be a co-trustee and co-manager of a kattalai, with the first defendant and others, his suit is not governed by S. 92, nor is such a suit prohibited by Act 1 of 1925. (*Wallace, J.*) ALAGAPPA CHETTIAR *v.* ARUNACHALLAM CHETTY. **97 I. C. 480=A. I. R. 1927 Mad. 338.**

—Suits.

Suits instituted by worshippers before the passing of the Act can be continued after it was passed. (*Devadoss, J.*) GANGADHARA *v.* RAMANUJA PEDDA JEEYANGAR. **108 I. C. 793=A. I R 1928 Mad. 905.**

Procedings instituted before the Act—Act does not apply retrospectively. (*Phillips and Krishnan, JJ.*) ARUMUGA THAMBIRAN *v.* NAMASIVAYA PANDARA SANNADHI. **91 I.C. 109=1925 M. W. N. 569=22 M. L. W. 130=48 Mad. 688=A. I. R. 1926 Mad. 162=49 M. L. J. 324.**

—S. 57—Right to sue.

Section 57 (4) makes it clear that any person having an interest can bring a suit for modifying a scheme in existence. A. I. R. 1926 Mad. 162, Ref. (*Devadoss, J.*) GANGADHARA. *v.* RAMANUJA PEDDA JEEYANGAR. **108 I. C. 793=A. I. R. 1928 Mad. 905.**

—S. 69—Applicability.

Clauses do not apply to lesser endowments but apply only to trustees of maths or excepted temples,

MAD. HINDU REL. ENDMTS. ACT (1927) S. 7—Jurisdiction.

(*Wallace, J.*) ALAGAPPA CHETTIAR *v.* ARUNACHALAM CHETTY. 97 I. C. 480=A. I. R. 1927 Mad. 338.

MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927).

S. 7—Jurisdiction.

A suit for setting aside the Board's decision under the Madras Religious Endowments Act that the temple is a public temple lies only in the Court where the temple is situate. (*Kumaraswami Sastri, J.*) VYTHILINGA PANDARA SANNADHI *v.* T. SADASIVA AIYAR. 116 I.C. 561=28 M. L. W. 535= A. I. R. 1928 Mad. 1272=55 M. L. J. 605.

—S. 7—Validity of.

Interpretation of Statutes—Act of subordinate egislature not observing conditions laid down by Act of Parliament and so invalid—Subsequent enactment by the same legislature observing all conditions and validating acts done under the previous Act—Subsequent Act is not *ultr avires*—S. 7, Madras Religious Endowments Act II of 1927 is not *ultra vires*. (*Kumaraswami Sastri, J.*) VYTHILINGA PANDARA SANNADHI AVERGAL *v.* T. SADASIVA AIYAR. 116 I.C. 561=28 M.L.W. 535= A.I.R. 1928 Mad. 1272=55 M.L.J. 605.

—S. 10—Notification.

Section 10 does not make it obligatory on the Government to issue fresh notifications where there is a prior valid notification. All that S. 10 does is to enable Government to issue a fresh notification after cancelling the old ones. (*Kumaraswami Sastri, J.*) VYTHILINGA *v.* SADASIVA AIYAR. 116 I.C. 561= 28 M.L.W. 535=A.I.R. 1928 Mad. 1272= 55 M.L.J. 605.

—S. 73 —Removal of trustee.

Religious endowment not regarding math or temple—No provision exists for removal of trustee of such endowment in S. 73 (1) or elsewhere in the Act. (*Curgenven, J.*) RANGANAYAKI *v.* SHIVARAMA DUBAY. 122 I.C. 337=A.I.R. 1930 Mad. 216= 58 M.L.J. 104.

—S. 73 (1) (d)—Scope.

Clause (*d*), S. 73 (1) does not enable the institution of any suit of a class unprovided for by the rest of the section. (*Curgenven, J.*) RANGANAYAKI *v.* SHIVARAMA DUBAY. 122 I.C. 337= A.I.R. 1930 Mad. 216=58 M.L.J. 104.

—S. 75—Scheme under.

S. 75 has no retrospective effect with regard to scheme settled under C. P, Code S. 92, before the enactment of the said Act. (*Srinivasa Ayyangar, J.*) CHINNAN CHETTIAR *v.* SUNDARESA AYYAR. 115 I.C. 54=A.I.R. 1929 Mad. 322.

—S. 77—Semi-religious endowments.—

The effect of S. 77 is to keep outside the operation of the Act any endowments, part religious, part secular, in respect of which the Board has not made an allocation to religious uses; when that has been done the portion allocated becomes religious endowment amenable to the provisions of the Act and until it is done, no portion is so amenable. If this be so, S. 73 (2) does not take the trust out of the operation of S. 92, C P. Code. (*Curgenven, J.*) RANGANAYAKI *v.* SHIVARAMA DUBAY. 122 I.C. 337= A.I.R. 1930 Mad. 216=58 M.L.J. 104.

—S. 78—Notice.

Order directing one of the trustees of an endowment to hand over charge of the trust properties is illegal if passed without giving notice. (*Devadoss, J.*) KAILASANATHA IYER *v.* NALLASIVAM. 106 I.C. 487=A.I.R. 1928 Mad. 361.

MAD. HINDU REL. ENDMTS. ACT (1927) S. 84—Powers of Board.

—S. 84—Court-fees.

Article 17, Court-Fees Act, stands by itself. Arts. 17-A and 17-B are separate articles and cannot be read together for the purpose of determining the Court-fee. And hence the Court-fee payable on an application under S. (2), Religious Endowments Act, to modify or set aside the decision under S. 84 (1) is the Court-fee leviable under Art. 17 (1), that is R. 15. A.I.R. 1929 Mad. 334, Appr. 113 I.C. 88= A.I.R. 1929 Mad. 52, Overruled. (*Kumaraswami Sastri, Curgenven and Walsh, JJ.*) DAMODARAN *v.* BD. OF COMMRS. 31 M.L.W. 428= 53 Mad. 266=1930 M.W.N. 404= A.I.R. 1930 Mad. 392= 58 M.L.J. 494.

The Court-fee payable on petitions under S. 84 (2), Madras Hindu Religious Endowments Act II of 1927, is Rs. 15. (*Ramesam and Venkatasubba Rao, JJ.*) SUNDARA AYYAR *v.* BOARD OF COMMRS. FOR THE HINDU RELIGIOUS ENDOWMENTS. 115 I.C. 157= 52 Mad. 388=29 M.L.W.298= 1929 M.W.N. 308= A.I.R. 1929 Mad. 334= 56 M.L.J. 373.

The proper Court-fee payable on an application under S. 84, Religious Endowments Act, praying for setting aside the order of the Religious Endowments Board and for a declaration that the plaint temple is a private one, is the fee laid down in Art, 17-A (1), Sch. II, Madras Court-Fees Amendment Act. (*Phillips and Odgers, JJ.*) VALIA RAJAH OF PENNATHUR *v.* HINDU RELIGIOUS ENDOWMENTS BOARD MADRAS. 113 I.C. 88=1928 M.W.N. 509= 29 M.L.W. 549=A.I.R. 1929 Mad. 52= 56 M.L.J. 113.

—S. 84—Injunction.

Temple in moffusil—Proper remedy against Board's decision under S. 84 being appeal to District Court, Original Side of High Court cannot restrain Board from giving such decision by injunction. (*Kumaraswami Sastri, J.*) UNIKANTA MENON *v.* BOARD FOR HINDU RELIGIOUS ENDOWMENTS, MADRAS. 116 I.C. 702=28 M.L.W. 964= A.I.R. 1929 Mad. 85= 55 M.L.J. 679.

—S. 84—Powers of Board.

Board in its written statement denying temple to be private—Even then Board does not preclude itself from acting as tribunal to decide whether temple is public or private. *Frome United Breweries* Co. v. *Bath Justice*, (1926) A. C. 586 and *Rex* v. *Essex Justice Perkins ex parte* (1927) 2 K. B. 475, not Appl. (*Kumaraswami Sastri, J.*) UNIKANTA MENON, *v.* BOARD FOR HINDU RELIGIOUS ENDOWMENTS, MADRAS. 116 I.C. 702=28 M.L.W. 964= A.I.R. 1929 Mad. 85= 55 M.L.J. 679.

It is within the competence of the Board to determine whether a math or temple is a public institution where the trustee or Mathathipathi allegcs that it is a private endowment or temple not falling within the Act. (*Kumaraswami Sastri, J.*) VYTHILINGA *v.* SADASIVA AIYAR. 116 I. C. 561= 28 M.L.W. 535=A.I.R. 1928 Mad. 1272= 55 M.L.J. 605.

MAD. HINDU REL. ENDMTS. ACT (1927)—S. 84—Powers of Board.

Where a question arises between a Mathathipathi or Dharmakartha on one side and the Board on the other as to whether the Religious Endowment Board has jurisdiction, S. 84 gives the Board power to determine that question subject to the right of the trustee under Cl. 2 to apply to the Court to modify or set aside the decision of the Board. S. 84 does not make any exception as to the class of disputes. (*Kumaraswami Sastri, J.*) VYTHILINGA *v.* SADASIVA AIYAR. **116 I.C. 561=28 M.L.W. 535= A.I.R. 1928 Mad. 1272=55 M.L.J. 605.**

Temple not in existence at the time of the Act—Board cannot ask the trustees to account for trust property or to rebuild temple—Civil Courts can. (*Kumaraswami Sastri, J.*) VYTHILINGA *v.* SADASIVA AIYAR. **116 I. C. 561=28 M. L. W. 535= A. I. R. 1928 Mad. 1272=55 M. L. J. 605.**

MADRAS HINDU TRANSFERS AND BEQUESTS ACT (I of 1914).

—Gift to unborn person.

A person unborn at the date of the Will can avail himself of the provisions of the Act of 1914, only in a case where a life estate is interposed between the death of the testatrix and the time provided for his taking the property but not otherwise, as the vesting of an estate cannot be kept in abeyance pending the happening of an uncertain event, nor by the intervention of trustees. 40 Mad. 818; 7 Cal. 178 and 26 Bom. 449, Ref. (*Spencer, J.*) APPU BHATTA *v.* UMA SUNDARI AMMA. **94 I. C. 42= 23 M. L. W. 547=A. I. R. 1926 Mad. 668= 51 M. L. J. 734.**

—Validity of.

Act No. 8 of 1921 has validated the law contained in the Madras Act I of 1914. (*Viscount Haldane.*) SOUNDARA RAJAN *v.* NATARAJAN. **92 I. C. 289= 28 Bom. L. R. 204=30 C. W. N. 434=48 Mad. 906= 6 L. R. P. C. 180=52 I. A. 310=23 A. L. J. 1010= 1926 M. W. N. 22=43 C. L. J. 70= A. I. R. 1925 P. C. 244=49 M. L. J. 836.**

Rules of Hindu Law as to succession and inheritance in force in the Presidency Towns are beyond the legislative competence of the Local Legislature and consequently Madras Act I of 1914 (Hindu Transfers and bequests Act) is *ultra vires* in so far as it purports to affect the Presidency Town. (*Wallis, C. J. and Ramesam, J.*) SOUNDARARAJAN *v.* NATARAJAN. **62 I.C. 987=44 Mad. 446=13 M. L. W. 662= 1921 M. W. N. 210=A. I. R. 1921 Mad. 258= 40 M. L. J. 354.**

When the vesting was before the Act and the devisee does not live up to the termination of the preceding estate nor even up to beyond the date of the passing of the Act, the Act does not apply. (*Ramesam and Jackson, JJ.*) SIVARAMA AIYAR *v.* GOPALAKRISHNA CHETTIAR. **82 I. C. 1044= A. I. R. 1925 Mad. 88=47 M. L. J. 337.**

MADRAS HINDU TRANSFERS AND BEQUESTS (CITY OF MADRAS) ACT—(Imp. VIII of 1921).

—Succession.

Hindu Law—Will—Limited interest to daughter and vested interest to her children—Child dying before the daughter—Heirs of the child to succeed.

One *S* died in December, 1912, leaving a will dated the 11th of November, 1911, whereby he bequeathed to his daughter *L*, wife of the first defendant, a house to be enjoyed by her during her life and to devolve on her children at her death. *L*, the wife of the first defendant, gave birth to a child on the 30th of September, 1918, the child died on the 1st October and *L* herself died on the 13th October, 1918. In a suit by her sister to recover the house from the first defendant, *Held*: that *L* had a life estate and under the terms of the will the property was to go to her children. The moment, therefore, a child was born, the estate vested in the child and succession would have to be traced through the child and not through the heirs of the testator. The first defendant would be the heir under the Hindu law and not the maternal aunt.

Held, therefore, that *L* took a life estate under the will of *S*, that her son acquired a vested interest in the property, the gift to him being valid by reason of the provisions of Act VIII of 1921 and that on the death of the child his heirs and not the heirs of the testator were entitled to the property. (*Kumaraswami Sastry, J.*) PERIANAYAGI AMMAL *v.* A. RATNAVELU MUDALIAR. **76 I. C. 1042=18 M. L. W. 625= 32 M. L. T. 137=A. I. R. 1924 Mad. 316.**

MAD. INAMS ACT, (1869),—Application of.

MADRAS IMPARTIBLE ESTATES ACT (II Of 1904).

—S. 4—Debts—Binding, nature of.

If a credit or can show that his debt was for a sum of money borrowed for the benefit of the estate under S. 4 it will be binding on the impartible estate but such a question cannot be decided in execution proceedings but can be done only in a separate suit. (*Krishnan and Waller, JJ.*) BOMMAYYA NAICKEN *v.* SUBRAMANIA IYER. **83 I.C. 165= 1924 M.W.N. 342=34 M.L.T. 290= A.I.R. 1924 Mad. 707=46 M.L.J. 374,**

—S. 4—Execution of decree.

The section does away with the special obligation as between sons and grandsons and their father and grand-fathers based upon the theory of pious obligation in the Hindu Law. Where therefore the decree was obtained for a sum of money which the father of the Zamindar had obtained as a trustee of a temple and misapplied himself, the debt thus being practically the result of a breach of trust. *Held*, such a debt as that can hardly be treated as a debt binding upon a successor-in-title to the Zamindari; for it would not be a debt which, if incurred, by the managing member of a joint Hindu family, would be binding upon the other co-parceners. (*Krishnan and Odgers, JJ.*) VENKATALINGAMA NAYANIM *v.* ARUNACHELLAM CHETTIAR. **78 I.C. 1012=19 M.L.W. 132= 1924 M.W.N. 214=A.I.R. 1924 Mad. 511.**

—S. 6—Objection to alienation.

The object of the Act is the preservation of the impartible estates in the hands of successive heirs, as a measure of public policy, and the prohibition against alienation can be raised for the first time in execution appeal though not raised before the executing Court or, even though no appeal is preferred against the decree. (Case-law discussed.) (*Odgers and Curgenven, JJ.*) RAJA OF KALAHASTI *v.* VENKATADRI RAO. **105 I.C. 248=50 Mad. 897= 26 M.L.W. 386=1927 M.W.N. 630= A.I.R. 1927 Mad. 911=53 M.L.J. 533.**

MADRAS INAMS ACT (VIII Of 1869.)

—Application of.

Madras Inams Act—Board's Standing Order 52 (2)—Order applies only when grantee dies after actual grant.

The order applies only to cases where the grantee dies after the actual grant, *i. e.*, after the execution and signature of the deed by the Commissioner, but before the actual delivery of the document to him. (*Wallace and Madhavan Nair, JJ.*) CHENDRAMMA *v.* NARASIMHAM, **100 I.C. 741=38 M.L.T. 133= 1927 M.W.N.156=25 M.L.W. 546= A.I.R. 1927 Mad. 404=52 M.L.J. 253.**

MAD. INAMS ACT (1869),—Boundaries.

—Boundaries.

Per *Spencer, J.*—The compilation of the Inam Register is a great Act of State and the statements contained therein carry great weight on questions of history and tenure of lands. [42 Mad. 253 (P.C.), Foll.] But when the matter in issue is a matter of the boundary between an inamdar and his neighbour under Madras Act VIII of 1869 the title-deed shall not be deemed to affect the interests of any person other than the inam-holder. 2 M.H.C. 327 and 2 M.H.C. 341, Ref. (*Sadasiva Aiyar and Spencer JJ.*) NACHIAPPAN *v.* ALAGAPPA CHETTY. **62 I.C. 87= 13 M.L.W. 172=A.I.R. 1921 Mad. 107.**

—Inam title deed.

Inam title deed is not conclusive as to p erson in whose favour enfranchisement is to operate—Deed cannot create title newly—Aggrieved party entitled to show that a name or names were added in the deed by mistake. 44 Mad. 643 (P.C.) Dist. (*Spencer and Ramesam, JJ.*) LAKSHMINARASIMHAM *v.* VENKATARATNAYAMMA. **70 I.C. 642=30 M.L.T. 334= A.I.R. 1921 Mad. 645.**

—Scope.

Protection of kudivaramdar's interest is the idea where the inam is of melvaram only. (*Ayling and Odgers, JJ.*) KRISHNA SASTRI *v.* SINGARAVELU. **91 I.C. 130= 1925 M.W.N. 218=48 Mad. 570= A.I.R. 1925 Mad. 780=48 M.L.J. 470.**

MADRAS INAM RULES (1859).

—R. 3 (1)—Inam.

Dissociation of land from office for the support of which it was granted for a long time—Resumption of inam is proper. 42 Mad. 673 and 43 Bom. 583, Dist. (*Reilly, J.*) VELU PILLAI *v.* SECY. OF STATE. **107 I.C. 785=A.I.R. 1928 Mad. 852.**

—R. 5, Cls. 1 and 3—Alienation.

The object of Cl. 3, R. 5, is to protect the interests of Government and the prohibition therein can only mean that, as against the Government, all alienations are inoperative, not that they are void. So long as Government do not step in to enforce their rights, whatever they are, by ignoring the alienation, it is not open to others to question a transaction which amounts to alienation. A. I. R. 1921 Mad. 292; (1911) 2 M.W.N. 384, Rel. on.

So long as lineal heirs of the grantee remain the Government has no right to resume and the property descends like ordinary property. (*Ramesam and Curgenven, JJ.*) VAIDYANATHA AIYAR *v.* YOGAMBAL AMMAL. **99 I.C. 452=50 Mad. 441=25 M.L.W. 660= A.I.R. 1927 Mad. 140=51 M.L.J. 695.**

MADRAS IRRIGATION CESS ACT (VII Of 1865).

—Water cess.

In considering the relations of Government with the inamdar in respect of supply of water, inam lands cannot be distinguished from zamindari lands. In the matter of considering the effect of an engagement the same principles ought *prima facie* to apply to the engagements implied in the inam settlement as to the engagements implied in the permanent settlement. In every case one has merely to estimate the effect of the grant of easement and nothing turns upon either the time of the grant or the particular tenure under which the lands are held by the landholder.

Where the tank supplying water to the inam land had its main supply from a hill stream rising in Government land and until it came to the suit land passed through Government lands, but the width of the stream was not increased nor any changes were made so as to draw more water in the stream and thus to increase the measure of the easement at the source,

MAD. IRRI. CESS ACT, (1865), S. 1—Liability to pay.

Held: that any improvement in the capacity of the tank was immaterial. So long as the easement was not enlarged, even if more water was conserved the Government was not entitled to impose water-cess. Where a certain easement is granted there are two ways of increasing cultivation without enlarging the easement. One is by a more economical use of water and the second method is by improving the capacity of the tank and by conserving water which might have otherwise overflowed, but this does not involve an extension of the easement and so long as the easement itself has not been enlarged, that is, so long as the water which might have flowed through the channel is not increased, apart from such variations as may be due to larger rainfall in one year and smaller rainfall in another year, the extension of irrigated lands does not justify the Government imposing water-cess. 40 Mad. 886 (P.C.), Foll.; 26 Mad. 66 and (1915) M.W.N. 636, Diss. from and doubted. (*Ramesam and Madhavan Nair, JJ.*) YAHYA ALI SAHEB *v.* SECY OF STATE. **106 I.C. 377= 39 M.L.T. 508=A.I.R. 1928 Mad. 97= 53 M.L.J. 769.**

—Water supply.

Water supply whether sufficient or not—Collector is the determining authority—Collector's opinion final subject to an appeal to the proper authority. (*Waller, J.*) GOPALA AIYAR *v.* SECRETARYOF STATE. **101 I.C. 346=38 M. L. T. 205= A. I. R. 1927 Mad. 1116.**

—S. 1—Liability to pay.

The question of the liability of a zamindar or inamdar or as for that matter any other landholder for the payment of cess for water used for purposes of cultivation depends undoubtedly on the extent to which he is entitled to supply of water free of charge. The extent to which he is so entitled to such free supply is, in the absence of a clear and definite arrangement or engagement, that is to say in most cases, determined by the accustomed supply of water at the time of the grant. In some cases and where there are no other means of determining such extent the pieces of land which are entitled to supply of water for wet cultivation and the number of crops for which such plots are entitled to such supply will undoubtedly be the true measure. But such a measure can be regarded as proper, generally speaking, only in cases where the irrigation of the lands in question is directly from the source of irrigation belonging to the Government. But wherever, having regard to the physical condition or situation the lands are irrigated from an intermediate source of irrigation which can be regarded only as belonging to the landholder, then the extent of the accustomed supply by Government can properly and reasonably be measured only by such intermediate means. If such intermediate means should be a channel taking its rise from a Government source of irrigation, then it may be measured by the size of the sluice, the hours of passage of water or the size of the channel, and in the case of a tank, by the size of the tank. In these latter cases there being no question of return to the Government source of the water passing to or through the landholder's means of irrigation, the proper measure of the accustomed supply, so far as the Government is concerned, is only the tank or the channel, and in such cases the proper measure has no relation to or bearing upon the extentof of thelaud cultivated or of the number of crops thereon. A.I.R. 1917 P.C. 42 and A.I.R. 1928 Ead. 97 Foll.; 26 Mad. 66 and (1915) M.W.N. 636, Dist. (*Srini-*

MAD. IRRI. CESS ACT (1865), S. 1—Liability to pay.

vasa Aiyangar and Curgenven, JJ.) SEVAGAN CHETTIAR *v.* SECRETARY OF STATE.

110 I. C. 878=1927 M.W.N. 898=A.I.R. 1928 Mad. 261.

A person cannot be said to irrigate his field, if, owing to a breach in the channel supplying water to his field, the water is collected in his neighbour's fields, overflows the ridges and then fills his lands. There may be cases where, water flowing in such manner might flow for a long time and thereby enable one to cultivate his field at a time when he is not entitled to water, but the flow of water for a short time, say for a day or two, through a breach of sluice which is closed but which gives way owing to natural causes cannot make a ryotwari tenant, in possession of land classified and assessed as wet, liable to pay penal assessment. 34 Mad. 21 and 26 M. L. J. 210, Dist. (*Devadoss, J.*) KANAKAMMA *v.* SECY. OF STATE.

107 I. C. 643=27 M. L. W. 791=39 M. L. T. 600=A. I. R. 1928 Mad. 145=54 M. L. J. 230.

—S. 1 (1),—Riparian Owner.

Riparian owner of land abutting Government river —He has natural right to use river water for irrigation —Riparian rights—No cess can be levied on such water. A.I.R. 1917 P.C. 42, Dist.; 34 M. L. J. 223 and A. I. R. 1927 Mad. 988, Foll. (Jackson, J. doubting); *Lyon v. Fish Mongers*, (1877) 1 A. C. 662 and 12 Moo. P. C. 131, Cons. (*Jackson and Reilly, JJ.*) SECY. OF STATE *v.* D. SURAYYA. **116 I. C. 573=1929 M. W. N. 118=29 M. L. W. 744=A. I. R. 1929 Mad. 227=57 M. L. J. 648.**

—S. 1—Scope.

Madhavan Nair J.—The law is well settled that permanent settlement, sanads and engagements arising out of inam settlements are engagements contemplated by Act VII of 1865. (*Ramesam and Madhavan Nair, JJ.*) YAHYA ALLY SAHIB *v.* SECY. OF STATE. **106 I. C. 377=39 M.L.T. 508=A. I. R. 1928 Mad. 97=53 M. L. J. .769.**

—S. 1—Water cess.

Water naturally springing in poramboke land—Source not traceable—Water used by ryot for over 60 years—Cess cannot be assessed under the Irrigation Cess Act. (*Devadoss, J.*) SECRETARY OF STATE *v.* K. SUBBA RAO. **99 I. C. 475=26 M. L. W. 10=38 M. L. T. 160=1927 M. W. N. 59=A. I. R. 1927 Mad. 382.**

MADRAS LAND ENCROACHMENT ACT (III Of 1905.)

—Grant of Patta.

Through the patta lands of the plaintiff passed a jungle stream and then emptied itself into Government irrigation source. When the Government granted patta the stream was not separately demarcated and specified as Government poramboke. The plaintiff dammed the stream and used the water for raising wet-crop on his dry lands and Government levied water-cess for the same.

Held, the grant of the patta did not carry with it the grant of any Government poramboke already existing in the field and therefore the Government were justified in levying water-cess. (31 I. C. 982 Dist). The patta was not a document of title or a deed of grant but merely a record of demand by Government, of a certain amount as land revenue or a certain area. (*Odgers and Wallace, JJ.*) THE SECRETARY OF STATE FOR INDIA *v.* RAGHAVACHARIAR.

MAD. LAND ENCROACHMENT ACT (1905), S. 14—Bar to suit.

83 I. C. 1009=47 Mad. 861=20 M.L.W. 815=1924 M.W.N. 820=A.I.R. 1924 Mad. 913=47 M. L. J. 503.

—Penal Assessment.

Penal assessment for period of occupation before Act is illegal. (*Ayling and Seshagiri Aiyar, JJ.*) J. C. H. FOWLER *v.* SECY. OF STATE.

61 I. C. 852=13 M. L. W. 230=A. I. R. 1921 Mad. 363.

—S. 7 (14)—Cause of Action.

The plaintiff claimed to be Zamindar of the village and as such sued the Secretary of State for India for a declaration of ownership and for recovery of possession and for injunction in respect of certain *puntas* or lands used as cattle paths in that village. The plaintiff alleged that the *puntas* were dedicated for the public use by the plaintiff's predecessors and subsequently about the year 1883 the plaintiff's predecessors let out the *puntas* to the agricultural tenants and got by prescription a complete title to the *puntas* by reducing them to their own private ownership; that in 1914 Government wrongly took proceedings against the tenants in occupation under Land Encroachment Act (III of 1905). Members of the village community were not made parties to the suit.

Held: the suit ought to be dismissed when it was found that the lands had been used as *puntas* even before the Permanent Settlement and that neither dedication nor prescriptive title was proved.

Per *Spencer, Offg. C. J.*—The fact that the assessment was levied under Land Encroachment Act from the occupants of the suit lands would not give plaintiff a right of action against the Government. Moreover as it was not brought within six months it was barred under S. 14. A preliminary notice under S. 7 does not give cause of action.

Per *Srinivasa Iyengar, J.*—The members of the community being not parties to the suit the declaration of ownership by adverse possession cannot be granted. The suit lands were not lakhiraj lands within S. 4 of Regulation XXV of 1802. (*Spencer, Offg. C. J. and Srinivasa Aiyangar, J.*) VENKATA KUMAR MAHIPATI SURYA RAO, RAJAH OF PITHAPURAM *v.* SECRETARY OF STATE. **85 I.C. 345=1925 M.W.N. 271=A.I.R. 1925 Mad. 415=47 M.L.J. 784.**

—S. 7—Jus tertii.

Although a tenant is not entitled to set up the title of a third person even though the title is that of the Government, yet he is entitled to plead that he was evicted by the true owner, whether the true owner be the Government or a private person and that after such eviction he attorned to the true owner. In such a case the landlord who let him into possession cannot rely upon the law of estoppel as contained in S. 116 as preventing his former tenant from pleading a *jus tertii* in a third person. The eviction need not be by actual dispossession of the tenant. If the true owner is armed with a legal process for eviction which cannot be lawfully resisted even though the tenant is not put out of possession the threat to put him out of possession amounts in Law to eviction. A notice under S. 7 of the Madras Land Encroachment Act (III of 1905) amounts in law to such an eviction. (*Devadoss and Waller, JJ.*) ALAGA PILLAI *v.* RAMASWAMI THEVAN.

91 I.C. 1024=1925 M.W.N. 878=23 M.L.W. 296=A.I.R. 1926 Mad. 187=49 M.L.J. 742.

—S. 14—Bar to suit.

S. 14 does not warrant the view that the suit for

MAD. LAND ENCROACHMENT ACT (1905) S. 14—Cause of action.

the recovery of the penal assessment imposed by Government under S. 5 is barred, if the plaintiff acquiesced in the levy of similar assessment in a previous fasli. For the explanation to the section provides that the cause of action in such a suit shall be treated as having arisen in respect of any assessment or penalty on the date, on which such assessment or penalty is levied and not on the date, on which any similar assessment or penalty was levied in a previous year. (*Oldfield and Venkatasubba Rao, JJ.*) SECRETARY OF STATE *v.* HUSSAIN SHERIFF SAHEB. **70 I.C. 165=1922 M.W.N. 330=16 M.L.W. 197=31 M.L.T. 49=A.I.R. 1922Mad. 232.**

—S. 14—Cause of action.

A person who receives notice to quit under S. 6 and in spite of it remains in undisturbed possession cannot be held to be evicted from the land.

An aggrieved person can elect as to which stage of the proceedings to complain against, so that if two different notices to quit are served on him, though he has shown his being aggrieved by the earlier one, he can make the later one the cause of action for his suit in Civil Court and limitation should be calculated only with reference to this notice. (*Coutts-Trotter, C.J. and Ramesam, J.*) KUNHIBI *v.* SECRETARY OF STATE. **82 I.C. 414=47 Mad. 927=20 M.L.W. 288=35 M.L.T. 74=1924 M.W.N. 765=A.I.R. 1924 Mad. 825=47 M.L.J. 379.**

—S. 16—Application of.

Where, before submersion, lands were the property of the Government subject only to the rights of the ryotwari tenures which they had created, the effect of the relinquishment is to restore to the Government full freedom to dispose of what was originally their own. (*Lord Salvesen.*) (SHRI MIRZA RAJA SHRI) PUSHAVATI ALAKH NARAYAN GAJPATIRAJ *v.* SECRETARY OF STATE. **94 I.C. 501=49 Mad. 249=53 I.A. 64=43 C.L.J. 378=28 Bom. L. R.865=24 M.L.W. 9=1926 M.W.N. 585=A.I.R. 1926 P.C. 18=50 M.L.J. 391.**

MADRAS LAND REVENUE ASSESSMENT ACT (1 OF 1876).

—Applicability.

———*Person becoming owner by adverse possession.*

Act I of 1876 applies not only to cases of transfer *inter vivos* but also to cases where a person has become owner of property by virtue of adverse possession. 11 M.L.W. 389 and (1927) M.W.N. 677, Rel. on. (*Wallace and Anantakrishna Aiyar, JJ.*) VENKATARAMA RAO *v.* MAHARAJA OF PITTAPURAM. **1930 M.W.N. 505=59 M.L.J. 312.**

—Onus.

To establish a cause of action for separate registry of lands under Madras Land Revenue Assessment Act, it is essential that the property which the plaintiff wishes to have separately registered should have once formed part of his permanently settled estate and should, at the time of the suit, belong to a different owner. The burden of proof that the income of the lands did not form part of the assets of the plaintiff's zamindari is upon him. Even if the defendant's lands lie geographically within the limits of the plaintiff's zamindari, there is no presumption that in setting the peshkush the income of all the lands in every village in the estate was taken into calculation. (*Waller and Madhavan Nair, JJ.*) V. SUBBA RAO *v.* SURYA RAO BAHADUR GARU. **101 I.C. 613=26 M.L.W. 235=1927 M.W.N 677=A.I.R. 1927 Mad. 714=53 M.L.J. 400.**

MAD. LOCAL BOARDS ACT (1884) S. 16—Election of member.

—S. 2—Registration—

———*Essentials.*

Full ownership of the person whose name is to be registered is all that is necessary for registration. (*Krishnan and Ramesam, JJ.*) GOPALA RAO *v.* VENKATASURYA RAO. **71 I.C. 200=17 M.L.W. 6=A.I.R. 1923 Mad. 368=44 M.L.J. 64.**

MADRAS LOCAL BOARDS ACT (V Of 1884)

—Powers of District Board.

———*Right of suit—President whether an agent of Board—Board whether can sue apart from President.*

The District Board is a corporate body capable of owning property having perpetual succession and a common seal of its own and is also capable of suing and being sued in its corporate name. As such a corporate body it is distinct from the President or the individual members thereof. The President is not really the agent of the Board. It cannot be said that the Board is incapable of suing in its own name and under its own initiative apart from the President. (*Sundaram Chetty, J.*) SECRETARY OF STATE *v* DISTRICT BOARD OF TANJORE. **31 M. L. W. 508=1930 M. W. N. 328=A.I.R. 1930 Mad. 679.**

—Validity of.

Per *Sadasiva Iyer, J., Spencer, J., contra*:—The Governor in Council has no power under the Act to make rules ousting the jurisdiction of Civil Courts in the matter of inquiring into the validity of elections and relegating those matters to a special tribunal. A person residing and owning property within the area of a Taluq Board has a substantial interest, sufficient to give him a right to sue for a declaration that the election of a member of the Board is invalid. (*Sadasiva Iyer and Spencer, JJ.*) LAKSHMINARASIMHA *v.* RAMALINGAM PILLAI. **59 I. C. 245=12 M. L. W. 202=(1920) M.W.N. 519=28 M.L.T. 205=39 M.L.J 319**

—S. 3 (23) (a)—Interpretation.

The words " over which the public have a right of way " qualify the whole section, and therefore where a Local Board finds a strip of land running along the side of the road to which nobody can make out a title, that strip of land does not become part of the road, unless it is proved that the public have a right of way over it. (*Coutts-Trotter, C. J.*) UNION BOARD OF PATTUKOTTAI *v.* ATHMANATHA AIYAR. **98 I. C. 21=A.I.R. 1926 Mad. 1159=51 M.L.J. 474.**

—S. 16—Election of member.

A person owning properties and residing within the administration area of a Taluq Board has sufficient interest to entitle him to sue for a declaration of the invalidity of an election of a member to that Board. The granting of such a declaration however is entirely in the discretion of the Court and the plaintiff cannot claim as of right. The rules framed by the Governor-in-Council under the Local Boards Act, dated 6th June, 1917, have the effect of excluding the jurisdiction of Civil Courts to entertain objections to the validity of elections even when those objections were based on the ground that there was no valid electoral register. *Sadasiva Aiyar, J.* (*Spencer, J., contra.*) Under Ss. 16 and 144 of the Local Boards Act, the Governor-in-Council has no power to make rules ousting jurisdiction of Civil Courts in the matter of enquiry and validity of elections. The supersession of old rules by new ones do not have the effect of superseding the old electoral register or of invalidat-

MAD. LOCAL BOARDS ACT, (1884), S. 33—Toll-gate.

ing acts done under the old rules. (*Sadasiva Aiyar and Spencer, JJ.*) LAKSHMINARASIMHA SOMAYAJIYAR v. RAMALINGAM PILLAI. **59 I. C. 245. 12 M. L. W. 202=28 M. L. T. 205=1920 M.W.N. 519=39 M.L.J. 319.**

—S. 33—Toll-gate.

The opening of a toll-gate is neither necessary for the safety nor the service of the public within S. 33 (*a*). (*Curgenven, J.*) MISRIKHAN KHALEEL v. DISTRICT BOARD, KURNOOL. **98 I. C. 854=1926 M. W. N. 954=51 M.L.J. 690.**

—S. 51—Adverse possession.

President is not agent of the Board—Management of chatram properties vesting with Board of which Collector is President—No fiduciary position exists and Collector can acquire title to the properties for Government by adverse possession—Adverse possession. 22 Mad. 342 ; 11 C. L. J. 373, Foll.; *Williams* v. *Pott*, 12 Eq. 149, Appr.; 22 Mad. 342 and 31 Mad. 111, Rel. on.; 21 Mad. 153 ; 53 I. C. 625; 38 Mad. 903; 27 Bom. 43 ; 37 Bom. 84 ; A. I. R. 1922 Mad. 369 ; 34 M. L. J. 344 and A. I. R. 1926 Mad. 769, Dist. (*Sundaram Chetty, J.*) SECRETARY OF STATE v. DIST. BOARD OF TANJORE. **1930 M. W. N. 328=31 M. L. W. 508=A. I. R. 1930 Mad. 679.**

—S. 73—Application of.

Issuing of a notification in accordance with S.73, fixing the date on which the payment is to be made is the condition precedent to the application of the provisions of S. 76. (*Abdur Rahim and Odgers, JJ.*) SECY. OF STATE v. NARAYAN CHETTIAR. **62 I.C. 251=13 M.L.W. 196=1921 M.W.N. 85=A.I.R. 1921 Mad. 117=40 M.L.J. 111.**

—S. 73—Road cess.

Intermediate landholder must pay to landholder whole road cess for land minus half the tax assessable on the poruppu—Art. 120, Lim. Act, applies to claim—Limitation Act, Art. 120. 9 M.L.W. 287, Foll. (*Spencer and Ramesam, JJ.*) KUPPUSWAMY AIYAR v. SETHUPATHI. **90 I.C. 973=22 M.L.W. 258=A.I.R. 1925 Mad. 1282=49 M.L.J. 462,**

—S. 73—Tenant—Meaning of.

A licensee under the holder of a Dhaimila inam in a zamindari for a period of 10 years with a right to tap date trees is not a tenant within the meaning of S. 73 so as to be liable to his licensor for the land cess payable by the latter under the Act. (*Wallace, J.*) THAMMIAH NAIDU v. MUSALIAH. **82 I.C. 391=20 M.L.W. 453=35 M.L.T. 67=1924 M.W.N. 769=A.I.R. 1924 Mad. 818=47 M.L.J. 383.**

—S. 89 (a)—Lease of toll-gates.

Leasing out toll-gates—Contract by president without sanction—Board is not bound as the sanction is not a mere formality. (*Curgenven, J.*) MISRIKHAN KHALEEL v. DISTRICT BOARD, KURNOOL. **98 I.C. 854=1926 M.W.N. 954=51 M.L.J. 690.**

—S. 100—Discretion.

If there were materials before a local authority to come to a conclusion as to the unhealthy and injurious nature of a tank, it is not for the civil Courts to inquire into the sufficiency, or otherwise, of those materials. It is for the Board to decide the question upon the evidence and when such decision is arrived at, it is not for the Court to interfere with it on the ground that the Court would have come to a different conclusion. But apart from the question of the Board using its powers for an indirect purpose, where a local authority is invested with discretionary powers, the Court can interfere in cases where such

MAD. LOCAL BOARDS ACT (1920)—Election Rules.

powers are exercised in a "capricious, wanton and arbitrary" or " unreasonable " manner.

When the Act gives power to a Taluk Board to require the owner of an insanitary tank to fill it up, the legislature could not have contemplated a case in which the insanitary condition of the tank was caused by the action of the Board itself, such as discharge of drainage water through channels constructed by the Board. The Taluk Board is empowered by S. 100 to do either of several things in the interests of the health and safety of the community and if it does not take into consideration any alternative course that was open to the Board to adopt and which would be more practicable and not entail obvious hardship on the owner of the land within its jurisdiction the Board might well be said not to have exercised its powers in a reasonable manner. The Board is required by the Act to consider each case on its own merits, and if it does not do so it would be exceeding the powers conferred on it by the Act. (*Abdur Rahim and Oldfield, JJ.*) TALUK BOARD, BANDAR v. MALLIKARJUNA PRASADA. **61 I.C. 497=44 Mad. 156=A.I.R. 1921 Mad. 92=40 M.L.J. 91.**

—S. 144, R. 35—Notice.

The objection that the person elected is likely to bring the local fund administration into contempt requires no notice to the person affected and no enquiry is contemplated by the rules, the reason very probably being that an enquiry into the nature of the ground referred to in Cl. (*e*) is not desirable in public interests. (*Kumaraswami Sastri and Waller, JJ.*) THIMMA REDDI v. SECY. OF STATE. **78 I.C. 91=47 Mad. 325=19 M.L.W. 59=33 M.L.T. 255=1924 M.W.N. 146=A.I.R. 1924 Mad. 523=46 M.L.J. 60.**

—S. 144—Rules.

The Local Boards being creations of statute and that statute having given power to the Government to frame rules for the purpose of working the Act, it is perfectly open to the Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the provisions of the Act. Where the Government in passing the Local Boards Act has not taken away any rights which had previously vested in the public, restrictions could be imposed by the Government acting on the rule-making power conferred by an enactment which creates new rights so long as the rules are not repugnant to any of the provisions of the Act. If power is given to make rules by the Act the fact that the Government purports to make rules under one section rather than another would not be a ground for holding that the rules are *ultra vires*. 12 M.L.W.202. Sadasiva Iyer J.'s opinion Disapp. If the rule is valid the Government has power to declare what shall be the nature and scope of the enquiry. 45 M.L.J. 156, Foll.; 30 Mad. 113, Dist., (*Kumaraswami Sastri and Waller, JJ.*) THIMMA REDDI v. SECY. OF STATE. **78 I.C. 91=47 Mad. 325=19 M.L.W. 59=33 M.L.T. 255=1924 M.W.N. 146=A.I.R.1924 Mad. 523=46 M.L.J. 60.**

—S. 156—Limitation.

Union Chairman drawing from Union funds and keeping with himself amounts due to Union clerk—Suit for the money by the clerk—Six months' rule does not apply. (*Ramesam, J.*) CHANDRASEKHARA LAXMINARAYANA v. P. NARASIMHAM. **86 I.C. 328=A.I.R. 1925 Mad. 942.**

MADRAS LOCAL BOARDS ACT (XIV Of 1920).

—Election Rules.

Members of Union Board not having taken oath or

MAD. LOCAL BOARDS ACT (1920)—Election Rules Breach of.

allegiance cannot elect President. (*Srinivasa Aiyangar, J.*) DWARKA CHARYULU *v.* SRI KRISHAN.
87 I.C. 825=A.I.R. 1925 Mad. 1152.

—Election Rules—Breach of.

Breach does not render election invalid unless result of election is materially affected. (*Sundaram Chetty, J.*) SEVUGA PANDIA *v.* SHRIRAMA DESIKAN. 101 I.C. 100=25 M.L.W. 453=
A.I.R. 1927 Mad. 546=52 M.L.J. 309.

—Election Rules—Scope.

The provision with regard to the president and not the vice-president being an authority, for the purpose of presenting nomination papers and scrutinizing them, cannot be regarded as mandatory, and any infringement of the provision can only be an irregularity which would be available for setting aside the election only if and when it should be made out that such irregularity affected the result of the election. (*Srinivasa Aiyangar, J.*) CHELLASWAMI KONAR *v.* K. SANGAMA. 103 I.C. 821=
A.I.R. 1927 Mad. 935.

—Election Rules—R. 1—"Election".

The term "election" embraces the whole procedure where an "elected member" is returned, whether or not it be found necessary to take a poll. (*Madhavan Nair and Curgenven, JJ.*) SRINIVASALU REDDY *v.* KUPPUSWAMI GOUNDAR. 108 I.C. 212=
1927 M.W.N. 876=27 M.L.W. 362=
A.I.R. 1928 Mad. 253.

—Election Rules,—R. 1—Election petition.

Where only one candidate for the Presidentship of a Local Board has been nominated and in accordance with the rules has been deemed to be elected, an election petition will not lie against his appointment.

The return of a solitary candidate is not, strictly speaking, an election by the electors, for the electors would have no say whatever in the matter. A.I.R. 1925 Mad. 376, Rel. on. (*Phillips and Madhavan Nair, JJ.*) KRISHNASWAMI *v.* GHULAM MD. GHOUSE. 97 I.C. 469=50 Mad. 86=
1926 M.W.N. 666=26 M.L.W. 35=
A.I.R. 1926 Mad. 951=51 M.L.J. 193.

—Election Rules—Rr. 1 and 7 (1)—Nomination of candidate.

Three candidates standing for election—Nomination paper of one candidate rejected—The second candidate withdrew—Third candidate coming in as unopposed—Defeated candidate suing for declaration that he was duly nominated—Civil Court has no jurisdiction to try the suit. A.I.R. 1923 Mad. 475 and A.I.R. 1925 Mad. 376, Foll.; A.I.R. 1926 Mad. 951, Dist. (*Madhavan Nair and Curgenven, JJ.*) SRINIVASALU REDDI *v.* KUPPUSWAMI GOUNDAR.
108 I.C. 212=1927 M.W.N. 876=27 M.L.W. 362=
A.I.R. 1928 Mad. 253.

—Election Rules—R. 4 (1) and (2)—Deposit.

The Act expressly lays down that unless the deposit is made at the time of the presentation of the petition, it shall be dismissed and that only on compliance with the provisions of sub-rule the Judge shall proceed to enquire into the petition. The language is very clear and mandatory in its character and unless the condition is complied with, the petition must be rejected. (*Krishnan, J.*) KRISHNAJI *v.* MUTHUVEERA. 72 I.C. 449=18 M.L.W. 299=
1923 M.W.N. 199=A.I.R. 1923 Mad. 490=
44 M.L.J. 344.

—Election Rules—Rr. 4 (2) and 11—Drawing of lots.

Bona fide variation in the system of drawing lots does not invalidate an election. In an election in drawing lots use of double system of slips, one set being marked with the names of candidates and the other set having one paper marked with a cross to indicate the prize and the other a blank, had to be resorted to, the system being such that the successful candidate was not necessarily the first drawn.

Held: that this was not such a variation as to invalidate the election. (*Pandalai, J.*) RAJABHADUR MUDALIAR *v.* VISWANATHA REDDIAR.
120 I.C. 851=30 M.L.W. 536=
A.I.R. 1930 Mad. 97=57 M.L.J. 481.

MAD. LOCAL BOARDS ACT (1920), S. 16—Notice.

—Election Rules—R. 4 (3)—Transfer.

An election petition was filed in the Court of the Subordinate Judge of Chingleput. The Subordinate Judge acting under R.4, Cl. 3 of the rules framed under the Madras Local Boards Act transmitted the case to the Court of the District Munsif of Madurantakam. The District Munsifs are not treated as subordinate to the Subordinate Judges.

Held: that the Court of the District Munsif, not being subordinate to the Subordinate Judge's Court, is not a Court to which the Subordinate Judge was entitled to send this petition. (*Krishnan, J.*) ARUNACHALA NAICKER *v.* C. K. VENKATACHARI.
93 I.C. 841=23 M.L.W. 407=1926 M.W.N. 296=
50 M.L.J. 368.

— S. 3 —Encroachment.

A public road includes land which lies on either side of the road way up to the boundaries of the adjacent property and includes a road poramboke used for conservancy purposes. Therefore refusal to remove encroachments thereon is an offence punishable under Ss. 159 (1) and 207 (2). (*Madhavan Nair and Reilly, JJ.*) PUBLIC PROSECUTOR *v.* PALANIYANDI. 106 I.C. 705=27 M.L.W. 16=
29 Cr.L.J. 113=51 Mad. 519=1 M. Cr.C. 46=
A.I.R. 1928 Mad. 160=54 M.L.J. 261.

—S. 4—Filing a petition.

A member who has not taken his seat can file a petition under S. 57. Filing a petition under S. 57 is not one of the ordinary functions of a member of a Taluq Board.

A member of Taluq Board who has not taken his seat is not incompetent to file a petition under S. 57 of the Local Boards Act. (*Ramesam, J.*) SUDARSANA RAO *v.* J. A. CHRISTIAN PILLAI. 76 I.C. 813=
33 M.L.T. 215=A.I.R. 1924 Mad. 396=
45 M.L.J. 798.

—S. 5—Inclusion in Union.

S village declared to form Union under S. 6 of Act V of 1884—Revenue village of *S* enlarged—*N* village not forming Union included in *S*—No notification of the inclusion of *N* in Union issued—*N* is not included within limits of the Union. (*Reilly, J.*) PRESIDENT, UNION BOARD *v.* NARAYANA.
113 I. C. 276=28 M. L. W. 657=1 M. Cr. C. 345=
30 Cr. L. J. 116=12 A. I. Cr. R. 83=
A. I. R. 1928 Mad. 1261=55 M. L. J. 718.

—S. 5 —Nomination of candidate.

Name of a candidate omitted from list of persons validly nominated published before 10 days of election —Candidate obtaining declaration from Court as validly nominated candidate—Nomination relates back to the date of publication of list. (*Sundaram Chetty, J.*) SEVUGA PANDIA *v.* SHRIRAMA DESIKAN.
101 I. C. 100=25 M. L. W. 453=
A. I. R. 1927 Mad. 546=52 M. L. J. 309.

—S. 16—Notice.

A Local Board being a body corporate is other than and much more than the sum of its individual members. Its business therefore can be transacted only at its duly constituted meetings. Giving notice of

MAD. LOCAL BOARDS ACT (1920), S. 17—Election resignation under S. 16 is one such business of the Board and can be transacted at a meeting of the Board. By circulating the notice of resignation to each member and upon its receipt by each member, the resignation does not take effect, although acceptance of resignation is not necessary under S. 16.

The President of a Local Board issued notice of his resignation to each member and its receipt was acknowledged by them. The Government also by its order expressed its view that the resignation took effect.

Held : that the order of Government was not conclusive but expressed only an opinion of the Government and it did not prevent a Court of law from coming to a contrary conclusion. There was no proper notice of resignation and therefore resignation did not take effect. (*Curgenven, J.*) SIVASANKARAM PILLAI *v.* EMPEROR. **113 I. C. 462=52 Mad. 446= 28 M. L. W. 695=2 M. Cr. C. 49=30 Cr.L.J. 164= 12 A. I. Cr. R. 103=A. I. R. 1929 Mad. 8= 56 M. L. J. 157.**

—S. 17, 11—Election.

Election for office of membership to fall vacant in future—Election takes effect from the date of vacancy falling due. (*Sundaram Chetty, J.*) SEVUGA PANDIA *v.* SHRIRAMA DESIKAN. **101 I. C. 100= 25 M. L. W. 453. A. I. R. 1927 Mad. 546= =52 M. L. J. 309.**

—S. 21—Liability to pay.

Where the President *bona fide* acts on behalf of the Board and where the Board gets the benefit of such an act, it is not open to the Board to deny liability which arises from the benefit which it gets. The President of a Taluk Board has power to instruct a vakil to defend a suit without obtaining the previous sanction of the Board and the Board is bound to pay the vakil even when there is no express sanction of the Board to engage a vakil. (*Devadoss, J.*) VENKATASUBBA RAO *v.* TALUK BOARD PRESIDENT. **111 I.C. 740=29 M. L. W. 517. A. I. R. 1928 Mad. 981=56 M. L. J. 110.**

—S. 23 (2)—Temporary absence.

The term "absence" indicates the non-presence at a particular place and at a particular point or period of time. The word "temporary" is sufficient also in itself to indicate that the absence has reference only to a period of time. If a particular place and time, therefore, has been fixed for the purpose of doing a particular act and the President 'of the Taluq Board being still the president is not at that place at the time, he must be regarded as temporarily absent. It is impossible to construe the expression "absence" as either absent from office or absent from taluq or other territorial division. (*Srinivasa Aiyangar, J.*) CHELLASWAMI KONAR *v.* K. SANGAMA. **103 I. C. 821= A. I. R. 1927 Mad. 935**

The mere absence for a few days of the President from his district on a visit to Madras does not necessarily vest in the Vice-President the power of appointing members of the Board. But even if it did, the fact that the Vice-President did not make any appointment and the President returned to his district and signed again in his district list of appointments of these members and directed it to be posted on the board where, and not in the *Fort St. George Gazette*, it had by the Act to be posted shows a perfectly proper exercise of the President's powers of appointment. (*Schwabe, C. J., Ramesam and Waller, JJ.*) PARTHASARADHI NAIDU *v.* KOTESWARA RAO. **78 I. C. 98= 47 Mad. 369=19 M. L. W. 402=34 M. L. T. 50= 1924 M. W. N. 272=A. I. R. 1924 Mad. 561= 46 M.L. J. 201 (F.B.).**

MAD. LOCAL BOARDS ACT (1920) S. 45—Adjournment.

—S. 24—Scope.

The persons who can be expressly authorized under S. 223 to file complaints are not confined to those to whom the President may delegate his authority under S. 24. (*Wallace, J.*) PUBLIC PROSECUTOR *v.* RAMAYYA MUDALIAR. **109 I. C. 603= 28 M. L. W. 140=1928 M. W. N. 293= 29 Cr. L. J. 587=1 M. Cr. C. 118= 10 A. I. Cr. R. 318=A. I. R. 1928 Mad. 969= 55 M. L. J. 573.**

—S. 35—Application of.

The election of a President is not a corporate action of the Board within S. 35. (*Devadoss, J.*) VAIDYANATHA *v.* MURUGIA. **115 I. C. 59= 1928 M. W. N. 549=A. I. R. 1928 Mad. 1077.**

S. 35 does not apply to an election petition. (*Ramesam, J.*) KANDASAMI CHETTIAR *v.* FOULKES. **92 I.C. 100=24 M.L.W. 213=A.I.R. 1926 Mad. 396.**

—S. 35—Interpretation.

There is nothing in S. 35 or any part of the Act, about *de facto* or *de jure* members. When the Act speaks of a member, President or Vice-President, it refers to a member, President or Vice-President validly elected or appointed according to the provisions of the Act. (*Ramesam, J.*) DEVASIGAMONY *v.* SETHURATNA IYER **87 I. C. 363=A. I. R. 1925 Mad. 1034.**

—S. 38—Contracts.

Quaere : S. 38 by necessary implication does not necessarily render all contracts invalid where such contracts are based upon the resolution which has been set aside by the Government. (*Kumaraswami Sastri, J.*) SETHUPATHI *v.* SECRETARY OF STATE. **92 I. C. 311=A. I. R. 1926 Mad. 341=50 M. L. J. 59.**

—S. 38—Parties.

C. P. Code, O. 1, R. 10—Against plaintiff's consent a person may be impleaded as defendant, even when such person thereby can counter-claim against plaintiff—Meeting of Taluk Board convened for electing member but adjourned by majority—Minority declaring adjournment illegal and electing plaintiff—Government withholding notification of his election in Gazette—Plaintiff suing District Board and its President for declaration that he was duly elected member—Government applying to be made defendant to which both plaintiff and defendant were opposed—Government being proper party should be added as the Government is given power of control over the Local Board and to suspend execution of any resolution under Sec. 38. A. I. R. 1926 Mad. 836 not Foll.; 11 C. L. J. 426; 5 Mad. 52; *Montgomery* v. *Foy*, (1895) 2 Q. B. 321; *Esquimalt* and *Nahaims Ry. Co.* v. *Wilson*, (1920) A. C. 358 Rel. on. (*Venkatasubba Rao, J.*) SECY. OF STATE *v.* M. MURUGESA MUDALIAR. **118 I. C. 780=1929 M. W. N. 67= 29 M. L. W. 753=A. I. R. 1929 Mad. 443.**

—S. 45—Adjournment.

The special officer had finished the election of elected members and the nomination of nominated members was also done, but no President had yet been elected.

Held : that the Board was not fully constituted without electing the president and that therefore the special officer was not yet rendered *functus officio* and so could preside over meeting held before that time and was fully entitled to adjourn meeting fixed for a certain date to another. *Smith* v. *Paringa Mines Ltd.*, (1906) 2 Ch. 193 and A. I. R. 1925 Mad. 1152, Dist. (*Pandalai, J.*) RAJABHADUR MUDALIAR *v.* VISWANATHA REDDIAR. **120 I. C. 851= 30 M. L. W. 536=A. I. R. 1930 Mad. 97= 57 M. L. J. 481.**

MAD. LOCAL BOARDS ACT (1920) S. 51—Effect.

—S. 51—Effect.

———*Old Electoral roll.*

An electoral roll once prepared continues in force till a fresh roll comes into effect. It cannot be said that it remains in force only during the year in which it was prepared or till the end of the next year. Elections held on the basis of six years old roll upheld. Policy of the Act discussed. 50 M. 726 considered. (*Ramesam, J.*) VENKATARAMA AYYAR *v.* KUPPUSWAMI AYYANGAR. **1930 M. W. N. 676.**

—S. 54—Rejection of nomination paper.

The President of a Union Panchayat issued a notice for the election to be held, and fixed a day for nominations. On the same day a new election roll was published which omitted the name of the petitioner, apparently on the ground that he had not paid his taxes. The date for the scrutiny of nominations was fixed a few days later. On that day, the President scrutinized the nominations on the footing of the new electoral roll, and rejected the petitioner's nomination as he was not on the new electoral roll.

Held: that the decision of the President was a ministerial act and not a judicial one. And even if it be held that his act in rejecting the nomination was judicial, still his act was in accordance with rules and there was no fault to find with it. There was no ground, therefore, for the issue of a writ of *certiorari*. The petitioner's remedy was by way of election petition. A.I.R. 1923 Mad. 475, Dist. (*Wallace and Madhavan Nair, JJ.*) DESI CHETTIAR *v.* CHINNASAMI CHETTIAR. **113 I.C. 874=28 M.L.W. 642=1928 M.W.N. 727=A.I.R. 1928 Mad. 1271=56 M.L.J. 162.**

—S. 55—Disqualification.

Submitting resignation of Honorary Magistrateship does not remove the disqualification until the resignation is accepted. (*Jackson, J.*) PRESIDENT, TALUK BOARD, HOSPET *v.* J. CHANDRAPPA. **85 I.C. 612=48 Mad. 309=20 M.L.W. 868=1925 M.W.N. 266=A.I.R. 1925 Mad. 173=47 M.L.J. 774.**

—S. 55—Magistrate.

A member of the Village Panchayat exercising criminal jurisdiction under S. 76 of the Village Courts Act is not a Magistrate within the meaning of the Local Boards Act.

Obiter:—The contention that a member of a body exercising the powers of a Magistrate is not a Magistrate is unsound. (*Srinivasa Aiyangar, J.*) MAYAKRISHNA KONE *v.* KULASEKHARA. **86 I.C. 120=48 Mad. 392=21 M.L.W. 144=1925 M.W.N. 78=A.I.R. 1925 Mad. 465=48 M.L.J. 116.**

—S. 55, Sch. X, Rr. 9, 10 (1) (2)—Terms of office of President.

Where under Sch. X, R. 10 (1), (2) the membership of the members of the Board expires on the date fixed in the Notification under R. 9 of the said schedule, but the term of Office of the President continues until a new President is appointed, *held* that notwithstanding the term of Office of the President did not expire on the date fixed in the notification, the membership of the President did expire on the said date and he was not disqualified to be appointed as a member of the new Board under S. 55 of the Act. It does not follow, that, because his term of Office as President was extended his term of Office as a member was also extended necessarily. (*Krishnan and Venkatasubba Rao, JJ.*) RAMASWAMI GOUNDAN *v.* VELAPPA GOUNDAN. **71 I.C. 1035=16 M.L.W. 848=1923 M.W.N. 130=46 Mad. 536=**

MAD. LOCAL BOARDS ACT, (1920) S. 56—Nominal member.

A.I.R. 1923 Mad. 192=44 M.L.J. 1.

—S. 56 (1) (h)—Absence at meetings.

A member did not attend the meeting of the Taluk Board on 10th July 1926. There was again a meeting of the Board on 12th August 1926, which also he did not attend. There were no meetings in September and October. There was a meeting on 13th November 1926 which he attended.

Held: that the period of absence for three consecutive months is to be computed from the date of his first default in attending the meeting and the member thus brought himself clearly within S. 56 (1) (*h*). A.I.R. 1926 Mad. 877, Foll.; *Goldsmith's Co, v. Westren Metropolitan Ry.* (1904) 1 K. B. 1, not Appl. (*Devadoss, J.*) DT. BOARD, GUNTUR *v.* SUBBA RAO. **112 I.C. 608=1928 M.W.N. 479=A.I.R. 1928 Mad. 983.**

—S. 56—Cessation of membership.

It seems an anamoly that no member can compel the President to report any absence of a member to the Board. But that is how the law runs, and if the President does not choose to report the matter to the Board, then the Board under the law has no power to restore the absenting member.

Section 57 (3) is not intended to mean that a member who had failed to attend three consecutive meetings, nevertheless remains a member until and unless there is an adverse decision against him under S. 57.

There is no justification in the language of S. 57 for holding that the mere presentation of an application under S. 57 has the effect of restoring *pro tem* to office one who has ceased to hold office. If an application is put in under S. 57 and the District Judge decided that a member did cease to be a member then he did cease to be a member from the date fixed in S. 56, but for the purpose of saving the validity of proceedings in which he may have taken part after he had ceased to be a member he is deemed to be qualified during that period. (*Wallace, J.*) SUBBAROYA *v.* MUTHUKUMARASAMY. **97 I. C. 581=1926 M. W. N. 628=24 M. L. W. 606=A. I. R. 1926 Mad. 1001=51 M. L. J. 265.**

The question whether the President of the Board has or has not reported the failure of the member to attend the meetings of the Board cannot affect the question whether the member had or had not ceased to be a member of the Board. (*Venkatasubba Rao and Reilly, JJ.*) MARIYA PILLAI *v.* MUTHUVELU. **96 I. C. 912=1927 M. W. N. 183=49 Mad. 563=A. I. R. 1926 Mad. 877.**

—S. 56—Discontinuance.

Failure to attend for three consecutive months and not three consecutive meetings will entail discontinuance—Period begins from first meeting—There must be more than one meeting. *Kershaw* v. *Mayor*: Shoreditch etc of, 22 T. L. R. 302 Foll. (*Venkatasubba Rao and Reilly, JJ.*) MARIYA PILLAI *v.* MUTHUVELU. **96 I. C. 912=1927 M.W.N. 183=49 Mad. 563= A. I. R. 1926 Mad. 877.**

—Ss. 56 & 57—Nominal member.

There is nothing either in the section or rules giving powers to a District or Subordinate Judge to question the appointment of a nominated member except on the specified ground, namely, disqualification under Ss. 56 and 57. A District or a Subordinate Judge is not intended to have any jurisdiction to decide whether the Local Government or the President of the District or Taluq Board as the case may be, properly exercised their power of appointing members. What he has jurisdiction to decide is whether a

MAD. LOCAL BOARDS ACT, (1920). S. 56—Restoration.

person so appointed is disqualified under S. 55 or S. 56 and nothing else. If it is desired to question the appointment of a member it is probably open to question it in Court by proceedings in the nature of *quo warranto*. (*Schwabe, C.J. Ramesam and Wallar, JJ.*) PARTHASARADHI NAIDU *v.* KOTESWARA RAO. **78 I. C. 98=47 Mad. 369=19 M. L. W. 402=34 M. L. T. 50=1924 M. W. N. 272=A. I. R. 1924 Mad. 561=46 M. L. J. 201 (F.B.)**

—S. 56—Restoration.

It is not open to the Board to restore members who have ceased to be such members on account of non-attendance at any future time. The restoration has to be made at the next meeting. But restoration at a future time would only be irregular and not *ultra vires*. (*Devadoss, J.*) VAIDYANATHA *v.* MURUGIAHAN. **115 I. C. 59=1928 M. W. N. 543=A. I. R. 1928 Mad. 1077.**

——The effect of the restoration of a member, thoughit may not be retrospective, is certainly to restore him to the office of membership for the balance of the period for which he was originally elected or nominated, including the rest of the day on which he was restored. It is not that he becomes a new member getting a fresh full period of office from the date of the restoration, he is restored to his former membership, that is, the membership he previously had by election or by nomination completed by the oath of allegiance which he had previously taken : A.I.R. 1925 Mad. 1034, Rel. on.

Where a member of the Taluk Board, who had been elected to the District Board, lost his membership of the Taluk Board by absence for three consecutive months and thereby lost his membership of the District Board also, and he was then restored to the membership of the Taluk Board. *Held* : that the resolution of the Taluk Board cannot have the effect of restoring him to the membership of the District Board which he lost : A. I. R. 1925 Mad. 1034, Rel. on. (*Ramesam, J.*) KANDASAMI CHETTIAR *v.* FOULKES. **92 I. C. 100=24 M. L. W. 213=A. I. R. 1926 Mad. 396.**

——President of Taluk Board losing membership and presidentship—Restoration to membership does not restore presidentship also. Symmers *v.* Regem, 98 E. R. 1203 Expl. and Dist. (*Ramesam, J*) DEVASIGAMONY *v.* SETHURATNA IYER. **87 I.C. 363=A. I. R. 1925 Mad. 1034.**

—S. 57—Court.

A District Judge or Subordinate Judge acting under S. 57 of the Act, acts as a Court and not as a *persona designata*. The use of the term 'Judge' instead of 'Court' is not sufficient to imply that he acts as *persona designata* any more than the use of the 'Court' would necessarily imply the contrary. (*Krishnan and Venkata Subba Rao, JJ.*) RAMASWAMI GOUNDAN *v.* VELAPPA GOUNDAN. **71 I.C. 1039=16 M.L.W. 848=1923 M.W.N. 133=46 Mad. 536=A.I.R. 1923 Mad. 192=44 M.L.J. 1.**

—S. 57—Disqualification.

The phrase "improper reception or refusal" in R. 11 (c) means only improper acceptance of a vote, which is on the face of it invalid, or refusing to accept as proper, a vote which is really proper, but there is no question of the lawfulness of the vote and questions as to the qualification of a member cannot thus be raised in an enquiry relating to the election of the President : Nell *v.* Longbottom, (1894) 1 Q. B. 767; A.I.R. 1926 Mad. 1001; and A.I.R. 1926 Mad. 396; Dist. ; A.I.R. 1925 Mad. 1034, Diss from.

Section 57 prescribes the forum for the determina-

MAD. LOCAL BOARDS ACT (1920). S. 57—Validity of Election.

tion of such questions, and in the absence of an enquiry under that section, the Court which holds the election enquiry must accept the persons who act as members as members. It is not the policy of the Act or the rules framed under it to allow such an objection to be raised in an election enquiry which is confined according to rules to irregularities and illegalities in the conduct of the election itself and not to anything antecedent to it. (*Devadoss, J.*) VAIDYANATHA THEVAR *v.* E. R. S. MURUGIAHAN CHETTIAR. **115 I. C. 59=1928 M.W.N. 549=A.I.R. 1928 Mad. 1077.**

—S. 57—Objection.

Where in breach of R. 3 the other nominated candidates were not joined in an objection to election but the point was not raised by the opposite party in the lower Courts, it cannot be allowed to be raised in revision. (*Curgenven, J*) MOIDEEN MEERA SAHIB *v.* CRUZ MICHAEL FERNANDO. **101 I. C. 436=50 Mad. 654=38 M. L. T. 222=25 M. L. W. 447=1927 M. W. N. 209=A. I. R. 1927 Mad. 536=52 M. L. J. 392.**

—S. 57—Revision.

The fact that the decision of the Judge is by S. 57 of the Act and by the rules said to be final does not preclude any revision. (*Schwabe, C.J., Ramesam and Waller, JJ.*) PARTHASARADHI NAIDU *v.* KOTESWARA RAO. **78 I.C. 98=47 Mad. 369=19 M.L.W. 402=34 M.L.T. 50=1924 M.W.N. 272=A.I.R 1924 Mad. 561 (F.B.) 46 M.L.J. 201**

——To assume jurisdiction to do an act by taking an erroneous view of the law, when there is really no jurisdiction raises a case for interference under S. 115, C.P.C. When a section says that an order is final it only means that it shall not be open to appeal and not that it bars revision by the High Court. (*Krishnan and Venkatasubba Rao, JJ.*) C. K. RAMASWAMI GOUNDAN *v.* MUTHU VELAPPA GOUNDAN. **71 I.C. 1039=16 M.L.W. 848=46 Mad. 536=1923 M.W.N. 133=A.I.R. 1923 Mad. 192=44 M.L.J. 1.**

—S. 57—Transfer.

In Sub-R. 3 of R. 4 of the rules for the conduct of enquiries and decision of disputes relating to elections, the words " to hold the enquiry " which has been initiated in the higher Court, *i.e.*, a transfer after part hearing of an enquiry would be permissible : (1918) M. W. N. 772 and 31 Mad. 227, Foll. (*Curgenven, J.*) MOIDEEN MEERA SAHIB *v.* CRUZ MICHAEL FERNANDO. **101 I.C. 436=50 Mad. 654=38 M.L.T. 222=25 M. L. W. 447=1927 M. W. N. 209=A. I. R. 1927 Mad. 536=52 M. L. J. 392.**

—S 57 —Validity of election.

S. 57 (1) cannot apply to *ex officio* members of the Board. It applies only to elected or appointed members. The effect of S. 57 and the rules is that in the case of elected members the validity of election can be questioned by (1) an election petition under the rules or (2) by a petition under S. 57. In the latter case the petitioner is confined to certain grounds. The election cannot be questioned in any other way. In the case of a nominated member, the validity of his membership can be questioned by a petition under S. 57 only on the grounds alleged in it. But there is nothing in the Act to prevent the fact of the membership of a person claiming to be an *ex officio* member from being questioned collaterally in another election petition. (*Ramesam, J.*) DEVASIGAMONY *v.* SETHURATNA IYER. **87 I.C. 363=A.I.R. 1925 Mad. 1034.**

MAD. LOCAL BOARDS ACT, (1920) S. 93—Exemption from tax.

—S. 93—Exemption from tax.

A salaried person is exempted from profession tax. (*Devadoss, J.*) TALUK BOARD, DEVAKOTTAI *v.* CHOCKALINGAM CHETTI. **106 I.C. 646= A.I.R. 1928 Mad. 212.**

—S. 93—Income.

"Income" is net income. (1913) M.W.N. 935 and 27 Mad. 547, Rel. on. (*Devadoss, J.*) ARUNACHALLAM CHETTIAR *v.* NAMAKKAL UNION BOARD. **110 I.C. 5=27 M.L.W. 841=A.I.R. 1928 Mad. 346= 54 M.L.J. 603.**

—S. 104—Interpretation.

"Licensed" in Cl. (3) (c) means "licensed" under Cl. 2 "and not licensed" for any purpose whatever. (*Phillips and Madhavan Nair, JJ.*) SIVAPATHA MUDALIAR *v.* SIKANDUR ROWTHER. **113 I.C. 81= 52 Mad. 260=29 M.L.W. 249=A.I.R. 1929 Mad. 38= 56 M.L.J. 37.**

—S. 129—Prohibition against filth.

The failure of a Local Board to provide a drain is not an excuse for letting one's sewage water flow over the neighbouring road. S. 129 which creates the liability is not governed by any condition that the liability shall not exist if there is no drain or cesspool in the street. (*Krishnan, J.*) PUBLIC PROSECUTOR *v.* PACHIAPPA MUDALI. **75 I.C. 760=18 M.L.W. 694= 33 M. L. T. 166=25 Cr. L.J. 56= A.I.R. 1924 Mad. 397.**

—S. 159—Encroachment.

Section 159 of the Act is not very happily worded. The real offence is the wrongful encroachment that is committed by the person. The notice referred to in the section is in a sense merely in the nature of a condition precedent to the prosecution and all that the Act says is that no one should be prosecuted straight-way simply because he has committed, or is deemed to have committed, an act of encroachment but the Act requires that some notice should be given to him and that he should be prosecuted only if, even after such notice, he fails to remove the encroachment. It will be against all principle to hold that even though a person commits an offence by thus disobeying the terms of the notice he should be deemed to commit a fresh offence every time the local authority chooses to give a fresh notice calling upon him to remove the obstruction. (*Srinivasa Aiyangar, J.*) RAMANUJACHARIAR *v.* T. V. KAILASAM AYYAR. **87 I.C. 969=48 Mad. 870=22 M.L.W. 736= 1925 M.W.N. 472=26 Cr. L.J. 1049= A.I.R. 1925 Mad. 1067=49 M.L.J. 386.**

MADRAS LOCAL BOARDS ACT, (V of 1920.)

—S. 159—Encroachment on public road.

———*Notice and complaint by President, District Board—Dismissal of complaint on ground that ownership of road was with Union Board—Fresh notice and complaint by President, Union Board—Validity.*

The accused having made an encroachment on a public road, the President of the District Board gave notice under S. 159, Madras Local Boards Act, directing the removal of the encroachment and subsequently preferred a complaint. The complaint was, however, dismissed on the ground that the ownership of the road was with the Union Board. The President of the Union Board issued a fresh notice under S. 159 and filed a fresh complaint. The accused having been acquitted under S. 403, Cr. P.C., *held*, that the second complaint was maintainable and that the acquittal was bad in law. (*Krishnan Pandalai, J.*) UNION BOARD, AYYAMPET *v.* RAMACHANDRA AYYAR. **1930 M.W.N. 500.**

MAD. LOCAL BOARDS ACT, (1920), S. 166—Unlicensed plying.

—S. 159—Owner.

In order to make a person liable for disobedience under S. 159 he must be the owner or the occupier of any premises which caused the obstruction or encroachment.

Where the accused had before the date of the notice created a trust in favour of the whole community in respect of the nandavanam and divested himself of all interest in it, the fact that he constructed the compound wall or formed a nandavanam would not be sufficient to make him an owner.

The mere fact that he was a treasurer of some fund of the community would not make him a trustee of the nandavanam, or bring him within the meaning of the term "owner' as used in the Local Boards Act (*Devadoss, J.*) VADUGU KUMAR NADAR *v.* EMPEROR. **110 I.C. 583=51 Mad. 524=28 M.L.W. 73= 10 A.I. Cr. R. 397=1 M. Cr. C. 150= 29 Cr. L.J. 727=A.I.R. 1928 Mad. 485= 55 M.L.J. 206.**

—S. 166—Liability to pay.

Section 166 (1) is intended to make persons who use the road of a District Board for making money by using motor vehicles upon it pay for that privilege. The first part is intended to make persons who ply a motor vehicle for hire within the limits of the District Board pay for it by taking out a license, and the latter part of it is intended to make persons who pick up passengers at separate fares outside the area of the District Board and who carry those passengers over a road of the District Board also take out a license: A.I.R. 1928 Mad. 166, Dist. (*Beasley, C.J. and Pandalai, J.*) (SHROFF) VEERAPPA *v.* EMPEROR. **31 M.L.W. 202=1930 M.W.N. 187= 3 M. Cr. C. 156=31 Cr. L.J. 625= A.I.R. 1930 Mad. 441.**

—The licensees are in law responsible for all that their servants do. The principle is that the act of the servant of a licensee is the act of his master, and that it is the licensee who does everything that is done under cover of the license. It is he who undertakes to conform to the terms of it and to be responsible that no breach of it takes place.

Where, therefore, a conductor of a motor plied the car on a road on which the licensee is prohibited to ply.

Held: that the licensee is liable. (*Wallace, J.*). SIVARAMA MUDALIAR *v.* MUTHANNANIENGAR. **102 I.C. 502=50 Mad. 913=38 M.L.T. 320= 28 Cr. L.J. 566=26 M.L.W. 13=8 A.I. Cr.R. 215= 1927 M.W.N. 925=A.I.R. 1927 Mad. 612= 52 M.L.J. 561.**

—S. 166—Separate fares.

What is meant by "separate fares" is individual fares as distinguished from a fixed amount for the whole vehicle. (*Beasley, C.J. and Pandalai, J.*) (SHROFF) VEERAPPA *v.* EMPEROR. **31 M.L.W. 202= 1930 M.W.N. 187=3 M. Cr. C. 156= 31 Cr. L.J. 625=A.I.R. 1930 Mad. 441.**

—S. 166—Unlicensed plying.

The act of plying for hire can only be done at the place and time that the hiring is effected. Therefore, a person who lets out his car for hire in *M*, a town within District *T*, and which is a municipality, need not obtain a license from the *T* District Board, if the car travels beyond the Municipal limits and traverses any of the *T* District Board roads. (*Madhavan Nair and Curgenven, JJ.*) LOCAL FUND OVERSEER, MAYAVARAM *v.* PAKKIRISAMI THEVAN. **106 I.C. 446=51 Mad. 527=1 M. Cr.C. 24=**

MAD. LOCAL BOARDS ACT (1920) S. 170—Unlicensed plying.

9 A.I. Cr. R. 289=29 Cr. L.J. 30=27 M.L.W. 66= A.I.R. 1928 Mad. 166=55 M.L.J. 213.

——The owner and the driver of a bus are both liable for plying without license under S. 166. The contention that the servant is merely obeying the orders of his master is no ground for relieving him of his liability when clearly the section covers the case of a person plying for hire, whether it is his own car or not: 43 Mad 438, Dist.; A. I. R. 1927 Mad. 612, Foll. (*Devadoss, J.*) PRESIDENT, DT. BD., ANANTAPUR *v.* ISMAIL SAHIB.

27 M.L.W. 28= A.I.R. 1927 Mad. 1195.

——The fact that the person authorised to grant or refuse the license (in this case, the President, Local Board) did not exercise his discretion reasonably in refusing to grant the license is not one that could afford an answer to a charge that the accused has done something (in this case, plying motor car) for which license was necessary and for which he had no license. (*Krishnan, J.*) KRISHNASWAMI PILLAI *v.* EMPEROR.

86 I.C. 57=26 Cr. L.J. 681=21 M.L.W. 254= 1925 M.W.N. 47=A.I.R. 1925 Mad. 476= 48 M.L.J. 132.

—S. 170—Applicability.

A market is a place set apart for the meeting of the general public of buyers and sellers freely open to any such, to assemble together, where any seller may expose his goods for sale and any buyer may purchase.

The word "new" in S. 170 is used in its ordinary signification as "for the first time opened or kept open," and therefore S. 170 does not apply to a market which was not opened after the coming into force of the Local Boards Act of 1920 but was in existence even prior to that Act.

Under S. 170 it is not the owner of the premises but the person who keeps open the market, that is presumably the person who collects or has collected for him the fees levied in the market for the exposure and sale of the goods, who is punishable. (*Wallace, J.*) PUBLIC PROSECUTOR *v.* CHERU KUTTI.

87 I.C. 973=26 Cr. L.J. 1053= A.I.R. 1925 Mad. 1095.

—S. 177—Private market.

Thiruvenkatachariar, J.—The Board can not refuse to grant a license on the ground that the location of the private market, in the Board's opinion, is detrimental to public health. The Board may give a notice to the owner under S. 176 to carry out such works as may be considered necessary for rendering a private market a suitable one or they should acquire the owner's rights in the private market under the Land Acquisition Act as provided in S. 180. Otherwise, it would be confiscating private rights without compensation, which intention cannot be imputed to the legislature. (*Jackson and Thiruvenkatachariar, JJ.*) ELLAMAL *v.* EMPEROR.

106 I.C. 716= 26 M.L.W. 771=1927 M.W.N 801=29 Cr. L.J. 126= 1 M. Cr. C. 96=A.I.R. 1928 Mad. 164= 53 M.L.J. 810.

—S. 184—Levy of fee.

Either under S. 184 or S. 164 fees are not legally leviable for the standing of an omnibus on a stand provided for by the Union Board for that purpose. (*Waller and Pandalai, JJ.*) RAHEEM SAHIB, *In re.*

118 I.C. 278=52 Mad. 714=2 M. Cr. C. 161= 30 M.L.W. 181=1929 M.W.N. 515= 30 Cr. L.J. 911= 1929 Cr. C. 56= A.I.R. 1929 Mad. 600 =57 M.L.J. 317.

—S. 193, Sch. 7 (j)—Kiln.

The term "kiln" conveys the idea of an outer structure of a permanent nature within which bricks are burnt. A.I.R. 1922 Cal. 194, Rel. on. (*Ramesam and Jackson, JJ.*) PUBLIC PROSECUTOR *v.* VALLAI UDAYAN.

111 I.C. 736=11 A.I. Cr. R. 142= 1 M. Cr. C. 302=29 Cr. L.J. 928= A.I.R. 1928 Mad. 1195.

MAD. LOCAL BOARDS ACT, (1920), S. 193—Disqualification.

—S. 193,—License.

Where the President of a Local Board thinks that a person should take out a license under S. 193, and that person refuses to do so, and carries on his industry without a license, the proper course is to prosecute him under S. 207 and not to apply under S. 221 for the recovery of the fee for the license. A.I.R. 1926 Mad. 576, Foll.; A.I.R. 1925 Mad. 1015, Commented on. (*Devadoss and Waller, JJ.*) UNION BD., PARAMAKUDI *v.* CHELLASWAMI THEVAR.

97 I.C. 947= 1926 M.W.N. 676=27 Cr. L.J. 1187= A.I.R. 1926 Mad. 1068.

—S. 193—Notification.

Under S. 193 (1), the authority which is to notify that a license for purposes mentioned in Sch. 7 should be obtained, is the Taluk Board and the license has to be obtained if the business is to be carried on within Union limits, from the President of the Union Board and if the business is to be carried on outside the Union limits but inside the Taluk Board limits, from the President of Taluk Board. Notification by Taluk Board has, therefore, force within Union limits also. (*Devadoss, J.*) UNION BOARD, POTHANUR *v.* RAMASUBBA AIYAR.

114 I.C. 824= 30 Cr. L.J. 367=2 M. Cr. C. 166.

—S. 193—Power of licensing.

Madras District Municipalities (Act 5 of 1920) S. 249—*Power of licensing* is not repealed by similar provision in S. 193. (*Jackson, J.*) PUBLIC PROSECUTOR *v.* RANGANAYAKULU.

101 I.C. 667= 25 M.L.W. 768=28 Cr. L.J. 491=38 M.L.T. 373= 8 A.I. Cr. R. 140=50 Mad. 845= A.I.R. 1927 Mad. 602=52 M.L.J. 653.

—S. 193—Proper authority to issue.

Under S. 193 of the Madras Local Boards Act (1920, the authority competent to notify that a license mentioned in Sch. VII should be obtained is the Taluk Board, and the license has to be obtained, if the business is to be carried within Union limits from the President of the Union Board, and if the business is to be carried on outside the Union Limits but inside the Taluk Board Limits, from the President of the Taluk Board. (*Devadoss, J.*) PRESIDENT, POTHANUR UNION BOARD *v.* RAMASUBBA IYER.

114 I.C. 824=30 Cr. L.J. 367.

—S. 193—Unlicensed storage of fish.

Forwarding agent collecting fish and keeping them in packages in a room before consignment—No license therefor—Conviction for unlicensed storage is justified 29 *Bom.* 193, *Dist.*; *N.E. Ry. v. Kingston*, 55 *J.P.* 518, *Ref.* (*Jackson, J.*) PUBLIC PROSECUTOR *v.* K. SAIDALI KUTTI.

102 I.C. 211=50 Mad. 752= 38 M.L.T. 341=25 M.L.W. 655= 1927 M.W.N. 389=28 Cr. L.J. 515= 8 A.I. Cr. R. 230=A.I.R. 1927 Mad. 624= 52 M.L.J. 559.

—S. 199 (2)—Disqualification.

The phrase "improper reception or refusal" in R 11 (c) means only improper acceptance of a vote, which is on the face of it invalid, or refusing to accept as proper, a vote which is really proper, but there is no question of the lawfulness of the vote and questions as to the qualification of a member cannot thus be raised in an enquiry relating to the election of the

MAD. LOCAL BOARDS ACT (1920) S. 199—Election petition.

President: *Nell* v. *Longbottom*, (1894) 1 *Q. B.* 767; *A.I.R.* 1926 *Mad.* 1001; and *A.I.R.* 1926 *Mad.* 396; *Dist. A.I.R.* 1925 *Mad.* 1034, *Diss. from.*

Section 57 prescribes the forum for the determination of such questions, and in the absence of an enquiry under that section, the Court which holds the election enquiry must accept the persons who act as members as members. It is not the policy of the Act or the rules framed under it to allow such an objection to be raised in an election enquiry which is confined according to rules to irregularities and illegalities in the conduct of the election itself and not to anything antecedent to it. (*Devadoss, J.*) VAIDYANATHA *v.* MURUGIAHAN. **115 I.C. 59=1928 M.W.N. 549=A.I.R. 1928 Mad. 1077.**

—S. 199—Election petition.

In a petition presented under the rules framed under S. 199 of the Act, to set aside the election of the President the petitioner did not allege that the election of the President was illegal as he was not a validly appointed member at the time nor did he claim the seat himself under Rule 3. The respondent had alleged that the petitioner was guilty of corrupt and illegal acts in connection with the election. The Court without making any inquiry held that the respondent was not validly appointed as a member at the time of his election and set aside the election and further declared that the petitioner's election was valid.

Held that the order was wrong. The Court cannot adjudicate the Respondent's election as invalid on a ground not taken in the petition. Nor could the Court make a declaration in favonr of the petitioner when it was not claimed by him in the petition at any rate without holding an inquiry into the allegations of corruption made by the respondent against the petitioner. (*Krishnan and Venkatasubba Rao, JJ.*) RAMASWAMI GOUNDAN *v.* VELAPPA GOUNDAN. **71 I C. 1039=1923 M.W.N. 133=46 Mad. 536=16 M.L.W. 848=A.I.R. 1923 Mad. 192=44 M.L.J. 1.**

—S. 207—Compensation.

A claim for compensation cannot be made a reason for non-compliance with notice: 21 L. W. 280=A. I. R. 1925 Mad. 584, Foll. (*Curgenven, J.*) NARAYANA AIYAR *v.* SUBRAMANIA CHETTY. **104 I. C. 910==39 M. L. T. 205=1927 M. W. N. 346=28 Cr. L.J. 894=A. I. R. 1927 Mad. 1113.**

—S. 207—Disobeying the notice.

Two notices issued—Second disobeyed—Prosecution canb e based for disobeying the second. A. I. R. 1926 Mad. 763, Rel on. (*Curgenven, J.*) NARAYANA AIYAR *v.* SUBRAMANI CHETTY, **104 I.C. 910=39 M. L. T. 205=1927 M. W. N. 346=28 Cr.L.J. 894=A.I.R. 1927 Mad. 1113,**

—S. 207—Disregarding the summons.

Houses outside the limits of Union cannot be assessed—Summons issued to owners of houses outside the limits of Union under S. 232—Disregarding the summonses is no offence. (*Reilly, J.*) PRESIDENT, UNION BOARD *v.* NARAYANA. **113 I.C. 276=28 M.L.W. 657=1 M. Cr.C. 345=30 Cr.L.J. 116=12 A.I. Cr. R. 83=A. I. R. 1928 Mad. 1261=55 M. L. J. 718.**

—S. 207—Duty of Criminal Court.

Whatever remedies may be open to the party it is not the province of the criminal Courts to go into the question whether the encroachment exists: A. I. R. 1925 Mad. 1015, Rel. on. (*Curgenven, J.*) NARAYANA AIYAR *v.* SUBRAMANIA CHETTY.

MAD. LOCAL BOARDS ACT, (1920) S. 221—Failure by Local Board.

104 I.C. 910=39 M.L.T. 205=1927 M. W. N. 346=28 Cr. L. T. 894=A. I. R. 1927 Mad. 1113.

—S. 212—License.

Jackson, J.—The Board is bound to grant a license and if when it receives the application in due course, it confines itself to saying that it will not grant the license, it is tantamount to passing no order on the application. Refusal to function under the Act is not passing an order under the Act. The order must be *intra vires* and an order *ultra vires* is no order at all. (*Jackson and Thiruvenkata Chariar, JJ.*) ELLAMAL *v.* EMPEROR. **106 I. C. 718=26 M. L. W. 771=1927 M. W. N. 801=29 Cr. L. J. 126=1 M. Cr. C. 96=A. I. R. 1928 Mad. 164=53 M. L. J. 810.**

—S. 214—Licenses.

As S. 214 requires all licenses to be granted in writing, it is not open to the President of the Taluk Board to grant a license orally. (*Devadoss, J.*) UNION BOARD, THIRUVETTIYORE *v.* ATCHU ACHARY. **111 I. C. 855=28 M. L. W. 503=1928 M. W. N. 790=11 A. I. Cr. R. 253=1 M. Cr. C. 292=29 Cr. L. J. 935.**

—S. 221—Assessment.

The Magistrate is not competent to inquire into the propriety of assessment which is entirely within the province of the Board. He can only determine the amount if the amount claimed is disputed on the ground that it has been paid wholly or partly, or that some one else is the assessee and not he. When there is a dispute as to the arithmetical calculation of the amount he certainly would be entitled to say whether the amount is correct or not, but that would in no way give him jurisdiction to inquire into the propriety or otherwise of the assessment. (*Devadoss, J.*) RANGESA RAO *v.* SWAMINATHA AYYAR. **108 I. C. 414=27 M. L. W. 320=29 Cr. L. J. 389=10 A. I. Cr R. 53=1 M. Cr.C. 12=A. I. R. 1928 Mad. 495.**

—S—Defence under.

Where an application has been made under S. 221 for collection of a penalty demanded under S. 164 (1) the other party cannot be heard to say that the demand is illegal and all that the Magistrate has to do is to collect the penalty demanded: A.I.R. 1925 Mad. 1015, Foll. (*Devadoss and Waller, JJ.*) MUSTAFA SAHEB *v.* UNION BOARD OF KAVERIPATNAM. **97 I.C. 812=27 Cr.L.J. 1180=1926 M.W.N. 678.**

—S. 221—Encroachment.

The Magistrate, to whom a case is referred under S. 221, for recovering a fine imposed for alleged encroachment, has power to go into the question whether the alleged encroachment was true and therefore justified the imposition of the fine: 49 Mad. 888=91 I.C. 529=A.I.R. 1925 Mad. 1015=108 I. C. 414=A.I.R. 1928 Mad. 425; 104 I.C. 910=A.I.R. 1927 Mad. 1113=97 I.C. 947=A.I.R. 1926 Mad. 1068 and 97 I. C. 812, Overruled. A.I.R. 1928 Mad. 682; A.I.R. 1929 Mad. 600; Cr. Revn. 1089 of 1928 and C.R. Rev. No. 247 of 1929, Confirmed. (*Beasley, C. J., and Anantakrishna Ayyar and Curgenven, JJ.*) PILLA RAMASWAMI *v.* PRESIDENT, TALUK BOARD, TADEPALLI. **32 M.L.W. 269=1930 Cr. C. 96=A.I.R. 1930 Mad. 766=59 M.L.J. 346. (F.B.)**

—S. 221—Failure by Local Board to take steps to compel a person to take out license to carry on trade.

———*Effect.*

Complaint for recovery of license fees under S. 221 of the Madras Local Boards Act is not maintainable if

MAD. LOCAL BOARDS ACT (1920,) S. 221—Penalty for encroachment.

the Local Board had not taken steps to compel the person to take out a license for carrying on the trade. (*Wallace, J.*) HEALTH INSPECTOR, TALUK BOARD, KUMBAKONAM *v.* GOVINDA PADAYACHI. **112 I.C. 591=29 Cr.L.J. 1087.**

—S. 221—Penalty for Encroachment.

Local Board moving Magistrate to recover penalty for encroachment—Defaulting party cannot plead in defence in Magistrate's Court that there was no encroachment. A. I.R. 1924 Mad. 389 Dist. (*Devadoss and Wallace, JJ.*) RAMACHANDRA SERVAI *v.* PRESIDENT, UNION BOARD, KARAIKUDI. **91 I.C. 529= 27 Cr.L.J. 97=49 Mad. 888= 22 M.L.W. 393=1925 M.W.N. 743= A.I.R. 1925 Mad. 1015=49 M.L.J. 356.**

—S. 221—Recovery of dues.

Application under S. 221 for recovery of dues—Other remedies not exhausted as enjoined by Government Orders—Government Orders being merely advisory, Magistrate cannot decline to consider application. (*Pandalai, J.*) PULAVARTHI LAKSHMANASWAMI *v.* ABDUL KHUDAVANDE SAHIB GARU. **126 I.C. 110=1930 Cr.C. 760= 3 M.Cr.C. 175=1930 M.W.N. 349= A.I.R. 1930 Mad. 703.**

—One G had erected a pandal without the permission of the Board. No license was applied for or granted before the pandal was erected. The Board, however, instead of taking action under S. 219, took a lenient view of his act and agreed to license the pandal on payment of the fee. A default having been made, the Board moved the Magistrate under S. 221.

Held: that there have been no grant of a license the license fee payable under the Act cannot be said to be due within the meaning of S. 221 and that section was inapplicable. (*Phillips and Madhavan Nair, JJ.*) EMPEROR *v.* MARIDU GOPAYYA. **110 I.C. 233= 57 Mad. 866=1 M.Cr.C. 136= 29 Cr.L.J. 681=10 A.I.Cr.R. 369= 28 M.L.W. 342=1928 M.W.N. 319= A.I.R. 1928 Mad. 682=55 M.L.J. 27.**

——In a proper case under S. 221 the defaulting party can plead by way of defence that no amount is due from him as he had not erected a pandal in contravention of S. 163; A.I.R. 1925 Mad. 1015, Not Foll.; A.I.R. 1926 Mad. 1068, Appr. (*Phillips and Madhavan Nair, JJ.*) EMPEROR *v.* MARIDU GOPAYYA. **110 I.C. 233=51 Mad. 866= 1928 M.W.N. 319=28 M.L.W. 342= 10 A.I.Cr.R. 369=1 M.Cr.C. 136= 29 Cr.L.J. 681=A.I.R. 1928 Mad. 682= 55 M.L.J. 27.**

——The accused were conducting trades which under S. 193 required licenses. They failed to take out license and the Board did not take steps in time to compel them to take out the licenses, but sought to recover the fees for these licenses under S. 221.

Held; that fees for licenses are not due unless the licenses had been granted. The grant of a license is *quid pro quo* for the fee. The Board cannot neglect its duty and profit by that neglect: A. I. R. 1928 Mad. 682, Foll. A. I. R. 1925 Mad. 1015, Expl. (*Wallace, J.*) HEALTH INSPECTOR, TALUK BOARD, KUMBAKONAM *v.* GOVINDA PADAYACHI. **112 I.C. 591= 1 M. Cr. C. 234=29 Cr. L. J. 1087.**

—The term "by virtue of" has not a wider scope than the term "under" used in the previous Act. The new Act does not make any change in this respect. Consequently money due under a contract, such as a lease cannot be recovered summarily in a Magistrate's Court

MAD. LOCAL BOARDS ACT, (1920) S. 223—Scope.

(*Ramesam and Jackson, JJ.*) M. ALI KHAN *v.* PRESIDENT, TALUK BOAD, KURNOOL. **84 I. C. 325= 1924 M. W. N. 545=25 Cr. L. J. 261= A. I. R. 1924 Mad. 898.**

——The amount due under a contract of lease of the tolls due to a Local Board is not "any fee, toll, costs, compensation, damages, penalties, charges, expenses or other sums due to a Local Board" within S. 221 and is not recoverable under the warrant of a Magistrate.

The words " other sums " in the section should be read *ejusdem generis* with what precedes them. (*Krishnan and Odgers, JJ.*) PUNYA SYAMALO, *In re.* **77 I.C. 240=47 Mad. 381= 25 Cr. L.J. 352=A.I.R. 1924 Mad. 669.**

——Imposition of fine in addition to recovery of fees due—Order is illegal and can be revised—Court acting under, acts as a Criminal Court—High Court—Revision. (*Wallace, J.*) PUNIYA SYAMALU *v.* EMPEROR. **72 I.C. 624=1922 M. W. N. 840= 24 Cr. L.J. 404=17 M.L.W. 155= A.I.R. 1923 Mad. 275.**

—S. 221—Scope.

It is open to a party appearing before a Magistrate under S. 221 to allege and prove that the fee claimed is not due from him "under or by virtue of the Act ": A.I.R. 1925 Mad. 1015, *Held* wrongly decided A.I.R. 1928 Mad. 682 and A.I.R. 1926 Mad. 1068, Foll. (*Waller and Pandalai, JJ.*) RAHEEM SAHEB, *In re.* **118 I.C. 278=52 Mad. 714=2 M. Cr. C. 161= 30 M.L.W. 181=1929 M.W.N. 515= 30 Cr. L.J. 911=1929 Cr. C. 56= A.I.R. 1929 Mad. 600=57 M.L.J. 317.**

—S. 223—Limitation.

Board served the accused with a notice in respect of an encroachment. Accused replied that there was no encroachment and invited the Board to make fresh enquiry. Board made further enquiries and issued a fresh notice on the accused.

Held: that time under S. 223 would run from the second notice, as in the circumstances both parties should be considered to have ignored the first notice and treated it as inoperative: 29 Bom 35, Rel. on. (*Waller and Madhavan Nair, JJ.*) RAGHAVACHARIAR *v.* PRESIDENT, UNION BOARD, TIRUVELLORE. **95 I. C. 600=23 M L. W. 620=27 Cr. L. J. 824= 1927 M. W. N. 343=A. I. R. 1926 Mad. 806.**

——It is not within the powers of the Local Board to extend the period of limitation of three months prescribed by S. 223, by giving fresh notice and constituting the disobedience to each of such fresh notices as amounting to an offence under S. 207. The real principle underlying S. 223, is that it should not be within the power or province of a local authority to molest and annoy persons by prosecutions which are not promptly undertaken by the local authority. (*Srinivasa Aiyangar, J.*) RAMANUJACHARIAR *v.* T. V. KAILASAM AIYAR. **87 I. C. 969=48 Mad. 870= 22 M. L. W. 736=1925 M. W. N. 472= 26 Cr. L. J. 1049=A. I. R. 1925 Mad. 1067= 49 M. L. J. 386.**

—S. 223—Scope.

The persons who can be expressly authorized under S. 223 to file complaints are not confined to those to whom the President may delegate his authority under S. 24. (*Wallace, J.*) PUBLIC PROSECUTOR *v.* RAMAYYA MUDALIAR. **109 I. C. 603= 28 M. L. W. 140=1928 M. W. N. 293= 29 Cr. L. J. 587=1 Mad. Cr. C. 118= 10 A. I. Cr. R. 318=A. I. R. 1928 Mad. 969= 55 M. L. J. 573.**

MAD. LOCAL BOARDS ACT, (1920)—S. 223—Scope.

—The license to carry on an offensive trade is granted for one year—the official year. Where the prosecution was for a person's not taking out licenses for the years 1923, 1924, 1925 and 1926.

Held: that prosecution having commenced within three months of the expiry of the period for 1926 was valid. Prosecution not having commenced within three months of the expiry of the period for previous years failed. (*Devadoss, J.*) S. ARTHUR *v.* APPAVU VELAN. **108 I. C. 411=10 A. I. Cr. R. 52=29 Cr. L. J. 388=1 M. Cr. C. 44.**

—S. 225—Limitation.

Section 225 does not apply to cases of this kind, but the ordinary law of limitation, namely three years, applies. If the Board is to sue as plaintiff it may be necessary for the President to obtain the sanction of the Board for instituting a civil suit. (*Devadoss, J.*) TALLAMRAJU VENKATSUBBA RAO *v.* PRESIDENT TALUK BOARD, REPALLI. **111 I. C. 740=29 M. L. W. 517=A. I. R. 1928 Mad. 981=56 M. L. J. 110.**

—S. 228 (2)—Civil Suit.

Where the provisions requisite for the collection of tax under the Local Boards Act are substantially complied with, no civil suit will lie on account of a mistake of fact committed *bona fide* by the assessing authority and the remedy against such mistake is that provided by the Local Boards Act: 24 Mad. 205 and 10 M.L.W. 592, Foll. 27 Mad. 547, Dist. (*Jackson, J.*) PURNACHANDRA MALA *v.* PRESIDENT, TALUK BOARD, CHICACOLE. **113 I.C. 560.**

—S. 228 (2)—Erroneous levy of profession tax—*Suit for refund—Maintainability.*

Where the provisions requisite for the collection of profession tax have been followed, if there is a mistake of fact committed *bona fide* by the assessing authority, the assessee's remedy is that provided by and confined to the statute, which is an appeal to the Local Board and consequently a suit is barred. (*Jackson, J.*) PATTARANI PURNACHANDRA MALA JAMNA DEVI *v.* PRESIDENT, TALUK BOARD, CHICACOLE. **113 I.C. 560.**

—S. 228 (2)—Setting aside assessment.

It cannot be said that the provisions of the Act have been complied with when the word "income" is treated as meaning gross income and not net income, and when the basis of assessment is in question, the civil Court can entertain a suit for setting aside the assessment on the ground that the basis of assessment itself is wrong and S. 228 (2) does not bar such a suit. (*Devadoss, J.*) ARUNACHALLAM CHETTIAR *v.* NAMAKKAL UNION BOARD. **110 I.C. 5=27 M.L.W. 841=A.I.R. 1928 Mad. 343=54 M.L.J. 603.**

—S. 235—Suit—Maintain ability of.

The phrase "same Local Board" implies that there must have been a Local Board of the nature under the old Act, and since there was no Union Board under old Act, unless the Union Board was validily constituted on the date when particular suit was filed, the Union Board has no *locus staudi* to maintain a suit in regard to matters which vest in it under the new Act. (*Wallace, J.*) UNION BOARD, DEVAKOTTA *v.* ARUNACHALAM. **123 I.C. 40=1930 M.W.N. 37=31 M.L.W. 712=A.I.R. 1930 Mad. 302=58 M.L.J. 107.**

—Sch. 10—Election.

Transitory Provisions, R. 15 (3)—Meeting called on date and at time fixed by Taluk Board President adjourned for want of quorum—Election at adjourned meeting is invalid. (*Srinivasa Aiyangar, J.*) DWARKACHARYULU *v.* SRI KRISHNAN. **87 I.C. 325=A.I.R. 1925 Mad. 1152.**

MADRAS MOTOR VEHICLES RULES.

—Rules.

Rules as to the place of inspection and the officer in charge of inspection are vague and must be made clear. (*Spencer and Ramesam, JJ.*) SECRETARY OF STATE *v.* SOMAYYA. **97 I. C. 847=24 M. L. W. 378=A. I. R. 1926 Mad. 1084=51 M. L. J. 446.**

—R. 30—Annually.

The word "annually" means once sometime in one year and once sometime in the next year and so on. (*Jackson, J.*) GANAPATHI HEDGE *v.* EMPEROR. **106 I. C. 110=39 M. L. T. 269=28 Cr. L. J. 1022=9 A. I. Cr. R. 163=A. I. R. 1927 Mad. 969.**

MADRAS PERMANENT SETTLEMENT REGULATION (Mad. Reg. 25 of 1802.)

—Applicability.

The fact that a sanad was granted after the date of the regulation does not necessarily make it a sanad issued under the regulation. And the mere use of the words '*sanad-i-milkiyat-i-istimrar*' does not show that the regulation governs the sanad: A. I. R. 1922 P. C. 168 Rel. on. (*Venkatasubbarao and Shrinivasa Ayyangar, JJ.*) SECRETARY OF STATE *v.* RAJA PARTHASARATHY. **96 I. C. 1011=49 Mad. 349=1926 M. W. N. 897=A. I. R. 1926 Mad. 706=50 M. L. J. 699.**

—S. 3—Zamindari Sanad.

——Inams in a zamindari—Right of resumption.

A sanad was issued on 24th August, 1802, to the *Zamindar* of Venkatagari, called in "*istimrar*" or deed of permanent settlement, which recited *inter alia* that in consideration of the relief which the *zamindar's* finances would derive from the relinquishment of his military services and of the Government charging itself with the duty of protecting his territories, the Government had fixed the *peshcush* at a figure not liable to alteration under any circumstances. Certain reservations were made to the Government about revenue derived from salt, and saltpetre, etc., without making any mention of *lakhiraj* or *inam* lands.

At the time of the sanad the Venkatagiri estate included a large number of *inam* lands which had been expropriated by the *zamindars* from time to time before the date of the *sanad* for charitable or pious purposes free of rent. Some lands had also been granted to people for services to the estate.

Held that S. 3 provided that in all cases of disputed assessment reference was to be made to the *sanads* and *kabuliyats* executed, that S. 4 which provided that the permanent settlement was to exclude *lakhiraj* lands and land paying favourable quit rents does not therefore apply to this case and that looking to the terms of the *sanad* and the circumstances under which it was issued the Government could not resume the *inams* or impose any further assessment upon the lands in respect of the *inams*. (*Mr. Ameer Ali.*) SECRETARY OF STATE *v.* RAJA OF VENKATAGIRI. **73 I. C. 741=30 M. L. T. (P. C.) 164=26 C. W. N. 809=1922 M. W. N. 1=48 I. A. 415=44 Mad. 864=A. I. R. 1922 P. C. 168=41 M. L. J. 624.**

—S. 4—Lakhiraj lands.—

——Village Service Inams:—

In the Madras Presidency, Village Service Inams were included in lakhiraj lands under Regn. 25 of

MAD. PERMT. SETT. REG. S. 4—Peishkush.
1802, and so were not only excluded from the assets of the zamindari for the calculation of peishcush but also from zamindari itself : A.I.R. 1923 Mad. 454 and 11 L. W. 186 Foll. ; Mad. Appeal No. 355 of 1922, not Foll. ; A.I.R. 1917 P.C. 8, Dist. (*Jackson and Reilly, JJ.*) LAKSHMI VENKAYAMMA *v.* SECY. OF STATE. **117 I.C. 292=A.I.R. 1929 Mad. 399.**

—S. 4—Peishkush.

Under the terms of the Sanad granted under the Permanent Settlement Regulation the Peishkush was fixed in commutation not only of the rentals of the cultivated land but also of all income which may be derived from forest and fisheries as well. (*Ayling, Coutts-Trotter and Ramesam, JJ.*) THE SECRETARY TO THE CHIEF COMMISSIONER OF INCOME-TAX, MADRAS *v.* ZAMINDAR OF SINGAMPATTI. **70 I.C. 504=45 Mad. 518=15 M.L.W. 496=1922 M.W.N. 353=31 M. L. T. 21=A.I.R. 1922 Mad. 325. (F.B.)**

—S. 8—Application of.

The fact that a sanad was granted after the date of the regulation does not necessarily make it a sanad issued under the Regulation. And the mere use of the words "sanad-i-milkiyat-i-istimrar" does not show that the Regulation governs the sanad, A.I.R. 1922 P. C. 168, Rel.

Per Srinivasa Ayyangar, J.—Section 8 and the Act itself apply only to lands, for the revenue payable to the Government in respect of which, an assessment is permanently fixed. (*Venkatasubba Rao and Shirinivasa Ayyangar, JJ.*) SECY. OF STATE *v.* RAJA PARTHASARATHY. **96 I.C. 1011=49 Mad. 349=1926 M.W.N. 897=A.I.R. 1926 Mad. 706=50 M.L.J. 699.**

MADRAS PLANTERS LABOUR ACT (I of 1903).

—S. 4—Descriptive marks.

The descriptive marks of a labourer are as important as his name and caste and, therefore, the omission to give descriptive marks makes the contract unenforceable. Whatever may be the reason for the Legislature requiring such particulars, it is not for the Court to enquire into the reasonableness of it. (*Devadoss and Waller, JJ.*) PUBLIC PROSECUTOR *v.* AYITHA. **98 I.C. 472=49 Mad. 426=23 M.L.W. 559=27 Cr. L.J. 1352=A.I.R. 1926 Mad. 670=50 M.L.J. 659.**

MADRAS PROPRIETARY ESTATES' VILLAGE SERVICE ACT (2 of 1894).

—Applicability.

——*Service inams.*

The Government are not entitled under any of the provisions of the Proprietary Village Services Act to deal with service inams included in the zamindari : A.I.R. 1922 P.C. 168, Foll. (*Devadoss, J.*) ANKAMA NAIDU *v.* BEEKI NAIDU. **99 I.C. 699=38 M.L.T. 9=A.I.R. 1927 Mad. 449.**

—S. 15—New appointment.

Where in proceedings under the Proprietary Village Service Act, S. 15 (2), the Collector directs one of the officers to be dispensed with and the other to be retained, the officer who is retained cannot be said to be newly appointed under S. 15 (1). (*Devadoss, J.*) VENKATA SIVA RAO *v.* VENKATARATNAM. **97 I.C. 893=24 M.L.W. 179=1926 M.W.N. 665=A.I.R. 1926 Mad. 953.**

—S. 15—Notice to Proprietor.

Under Section 15, Clause 2, it is the duty of the Collector of a district issue notice to a proprietor of a village asking him to send in his nominations to the village office. This duty cannot be performed by any of his subordinates. If the Sub-Collector issues a notice and not getting any nomination within six weeks nominates the appellants the appointment is not valid. (*Devadoss, J.*) VENRATASUBBAYYA *v.* GOVINDA KRISHNA. **85 I.C. 282=20 M.L.W. 826=A.I.R. 1925 Mad. 290.**

—S. 17—Continuance of grant.

Where Government excludes a village service inam from the permanently settled estate, but continues the office holders in possession of their right, it could be inferred that the Government has continued the grant : 11 L.W. 1186 Foll. ; 24 M.L.J. 538, Not Appr. (*Jackson and Reilly, JJ.*) LAKSHMI VENKAYAMMA *v.* SECY. OF STATE. **117 I.C. 292=A.I.R. 1929 Mad. 399.**

MAD. PROP. EST. VILL. SERVICE ACT, (1894) S. 27—Remedy under

—S. 17—Enfranchisement.

——*Karnam Inam.*

Karnams had and have public duties to discharge and their office is a public office and their duties are of a public nature. It cannot be inferred that they are private servants of the zamindar from the fact that they render some private service to him.

The plaintiff zamindar granted karnam service inams prior to the permanent settlement which the Government enfranchised under S. 17 from the condition of service and imposed quit rent. The plaintiff sued to obtain possession contending that the land could not be enfranchised.

Held, that while in regard to private service inams the zamindar has the right of resumption, in regard to the village service inams, they are resumable by Government and therefore the enfranchisement was justified under S. 17. (Cases Ref.) (*Ramesam and Venkatasubba Rao, JJ.*) SECRETARY OF STATE *v.* RAJAH VASI REDDI. **119 I.C. 305=30 M.L.W. 129=A.I.R. 1929 Mad. 676.**

—S. 17—"Proprietor."

"Proprietor" in the proviso means proprietor as defined in S. 4, and is strictly confined to a person registered as proprietor after the permanent settlement. Hence if the grant is one continued by Government at the time of the Permanent Settlement, no matter by whom the grant was originally made, the right of enfranchisement rests with Government. (*Jackson and Reilly, JJ.*) LAKSHMI VENKAYAMMA *v.* SECRETARY OF STATE. **117 I.C. 292=A.I.R. 1929 Mad. 399.**

—S. 27—Non-compliance—Effect.

The plaintiff leased out his melwaram right to the defendants. The defendants agreed as a condition of the lease, to pay the salary of the Karnams. Later, the Government undertook to pay the Karnams and added the amount to the peishkush due from the plaintiff. The plaintiff thereupon filed a suit in the civil court for the recovery of the amount payable by the defendants towards the Karnam's salary.

Held, that the plaintiff's suit was incompetent by reason of his not having applied for the determination of the amount payable by the defendant in respect of his karnam's salary as provided for by S. 27 (4). (*Devadoss, J.*) DORASWAMI IYER *v.* THIRUVANGDA MUDALIAR. **86 I.C. 608=A.I.R. 1925 Mad. 916.**

—S. 27—Remedy under.

——*Melvaram in zamindari—Lessee to pay village officers—Act II of* 1894, *applied to zamindari—Lessor is entitled to money value of payments to village officers* (*Wallis, C. J. dissenting*)—*Landlord and tenant.*

During the continuance of a lease of the melvaram of a zamindari to a rent farmer, the Madras Act II of 1894 was extended to the zamindari and the payments to village officers which were attached to as a burden on the melvaram right were abolished and the peish-

MAD. PROP. EST. VILL. SERVICE ACT, (1894) S. 27—Tenant.

cush payable by the zamindar was enhanced. The lease was silent as to what should happen when the payments to the village officers were abolished.

Held, Per *Sadasiva Aiyar J*, *Wallis, C.J. dissenting* that after the extension of the Act to the zamindari the lessee was bound to pay to the zamindar the money value of the payments to the village officers which (payments) had been abolished and that the remedy given by S. 27 (4) of the Act was not the sole but only a cumulative remedy. (*Wallis, C. J. and Sadasiva Aiyar, J.*) MUTHANAN SERVAI *v.* SETHUPATHI.

64 I.C. 312=13 M.L.W. 646=A.I.R. 1921 Mad. 587.

—S. 27 —Tenant'.

A Zamindar who was entitled to receive from the cultivating ryots, as his *melvaram*, 48 per cent of the produce, 9 per cent of which was to be paid by him to village officers as pay, executed a *cowle* to farmers in respect of the said *melwaram* right under which the *cowledars* undertook to make the payment to the village officers themselves. Thereafter the payment to village officers was abolished by Statute and the zamindar thereupon sued the *cowledars* for the amount which they would have had to pay to the Village Officers, on the ground that the *cowledars* were only agents of the zamindar and that they had to account to the zamindar for the said amount *held*.

Per *Chief Justice and Coutts-Trotter, J.*—In construing the *cowle*, such a term could not be imported into the *cowle* by implication and the remedy of the Raja was not under the terms of the *cowle* but under Sect. 27 (4) of the Madras Proprietary Estates Village Service Act of 1894 by an application to the Collector for increase of rent.

"Tenant" in Sect. 27 (4) includes a person in the position of a *cowledar*. (*Schwabe, C. J. and Coutts-Trotter and Kumaraswami Sastri, JJ.*) TIRUNEELAKANTAM SERVAI *v.* B. RAJA RAJESWARA SETHUPATHI.

70 I.C. 469=15 M.L.W. 556=30 M.L.T. 317=46 Mad. 177=A.I.R. 1922 Mad. 263 (F.B.)=43 M.L.J. 158.

MADRAS REGULATION (1 of 1816.)

—Kaval fee.

Tanjore Palace Estate—Kaval fee can be collected by the landlord from the tenants of the Tanjore Palace Estate. (*Devadoss*, J). VENKATARAMA *v.* NARAYANASWAMI.

86 I.C. 958=A.I.R. 1925 Mad. 1098.

MADRAS REVENUE BOARD'S STANDING ORDERS.

—O. 4—Onus.

Plaintiff applying for water—Government servants allowing him to take water—Onus is on Government to prove that plaintiff took water unauthorisedly. (*Devadoss, J.*) PITCHAYYA *v.* SECRETARY OF STATE.

86 I.C. 267=21 M.L.W. 155=A.I.R. 1925 Mad. 474.

—O. 18—Tree Pattas.

The alteration by the Government of the Standing Order No. 18, and the refusal to issue fresh tree pattas, are not meant to put an end to the right over the trees of the tree pattadar. Only where the land pattadar and tree pattadar happen to be the same person, the new policy is intended to be carried out and not that the trees should be forcibly taken away from the tree pattadar and granted to the land pattadar: 36 Mad. 148, Expl. (*Ramesam, J.*) CHINNAPPAN NAIDU *v.* RAJU GOUNDAN.

102 I.C. 656=A.I.R. 1927 Mad. 717=53 M.L.J. 104.

MADRAS REVENUE RECOVERY ACT (2 OF 1864) —Scope.

The provisions of Madras Act 2 of 1864 are complete and cannot be affected by a general Act like Reg. 7 of 1828; 41 Mad. 955, Ref. (*Ramesam and Devadoss, JJ.*) CHINA BRAHMAYYA *v.* PAPPUSETTI GANGALU.

110 I.C. 114=51 Mad. 695=1928 M.W.N. 316=27 M.L.W. 420=A.I.R. 1928 Mad. 499=55 M.L.J. 33.

—S. 38—Confirmation of sale.

Where the Revenue Divisional Officer has confirmed a sale acting under S. 38 and has not chosen to exercise his power under the proviso, the sale becomes final and unimpeachable. Neither the District Collector acting under the general powers of revision under Reg. 7 of 1828, nor the Board of Revenue has any jurisdiction to interfere with the sale. (*Ramesam and Devadoss, JJ.*) CHINA BRAHMAYYA *v.* PAPPUSETTI GANGALU.

110 I.C. 114=51 Mad. 695=1928 M.W.N. 316=27 M.L.W. 420=A.I.R. 1928 Mad. 499=55 M.L.J. 33.

—S. 39—Revenue Sale.

———*What passes under*—

In a revenue sale what is sold is the proprietary interest in the land and not merely the interest which the registered pattadar actually had. Where the registered pattadar of land paying revenue to the Government is a Hindu widow who succeeded to the land as heir to her husband on an alienee from her, a sale of the land for arrears of revenue passes to the purchaser not merely the widow's interest but the full proprietary interest in the land. 13 Mad. 89, Dist. (*Abdur Rahim and Oldfield JJ.*) GOVINDA MALAVARAYAN *v.* VELU MALAVARAYAN.

59 I.C. 307=(1920) M.W.N. 701=12 M.L.W. 530.

—S. 58—Jurisdiction of Civil Court.

The Courts are prohibited from deciding any question as to the rate of revenue. or as to the amount of assessment, but they have full jurisdiction to decide whether or not the land or person is at all under liability to be assessed to land revenue. Similarly if there is a binding engagement or a grant or a release, S. 58 does not deprive the civil Courts of their undoubted jurisdiction to give effect to and enforce its terms.

Where Government issued a notification which contained a definite undertaking that the rate of assessment fixed would not be varied during the thirty-year period of the settlement:

Held: that this amounted to a clear engagement on he part of the Government not to increase the rate-tf assessment and the civil Court had jurisdiction to odeclare any increase of rate on the part of Government to be illegal: A.I.R 1925 Mad. 355. Foll.; 27 Mad. 386, Ref. (*Ramasam and Venkatasubba Rao. JJ.*) KELU NAIR *v.* SECRETARY OF STATE. **91 I.C. 82=48 Mad 586=22 M.L.W. 762=1925 M.W.N. 815=A.I.R. 1925 Mad. 1134=49 M.L.J. 79.**

Where lands which were assessed as dry lands were re-assessed as wet during the thirty years period of revenue settlement, the enhanced re-assessment is illegal and *ultra vires* and S. 58 does not bar a suit for recovery of the excess amount levied. The Collector cannot, even under the orders of the Board of Revenue vary annual payment assessed during the period for which the assessment is made after the settlement is duly notified by the Government. (*Devadoss and Jackson, JJ.*) SECRETARY OF STATE *v.* V. K. RAMANUJACHARIAR.

85 I. C. 419=48 Mad. 282=20 M. L. W. 973=1925 M. W. N. 264=A. I. R. 1925 M. 355=47 M. L. J. 780.

MAD. REVENUE RECOVERY ACT (1864), S. 59—Applicability.

A I. R. 1925 Mad, 355=47 M. L. J. 780.

—S. 59—Applicability.

Where the payment of water-cess wrongly levied is in fact made under protest and without the issue of coercive process under the Revenue Recovery Act the period of limitation for a suit for declaration and refund of the cess would not be as laid down in S. 59 but as prescribed by the ordinary law; A.I.R. 1923 Mad. 652, Foll. (*Curgenven, J.*) INGULIGI VENKATASIVARAMADASS *v.* SECRETARY OF STATE. **99 I. C. 1055= 38 M. L. T. 44=1927 M. W. N. 201= A. I. R. 1927 Mad. 350=52 M. L. J. 132.**

—S. 59—Limitation.

———*Computation.*

The period of two months (the period of notice) should be deducted in computing limitation. (*Ramesam and Venkatasubba Rao, JJ.*) KELU NAIR *v.* SECRETARY OF STATE. **91 I. C. 82= 48 Mad. 586=22 M. L. W. 762=1925 M. W. N. 815= A. I. R. 1925 Mad. 1134=49 M. L. J. 79.**

A suit to set aside a sale for arrears of revenue on the ground of fraud and irregularity is within time if brought within 6 months of the plaintiff becoming aware of the fraud or irregularity. (*Spencer and Ramesam, JJ.*) MUTHIAH CHETTIAR *v.* KARUTHAMADU PILLAI. **63 I.C. 135=13 M.L.W. 598= A.I.R. 1921 Mad. 318.=41 M.L.J. 92.**

—S. 63—Scope.

The application of the Regulation X of 1831 is not limited to only registered minor owners of property. by S. 63 of Madras Act (II of 1864). (*Ramesam and Reilly, JJ.*) K. KRISHNA REDDI *v.* T. RAMAKRISHNAYYA CHETTY. **85 I.C. 873=48 Mad. 288= 20 M.L.W. 791=1925 M.W.N. 49= A.I.R. 1925 Mad. 253=47 M.L.J. 667.**

MADRAS RIVERS CONSERVANCY ACT, (6 of 1884.)

—S. 16—Cause of action.

Where Government was in possession of the Kristna river under the provisions of Act 6 of 1884, the Government would not be liable for mesne profits in respect of lankas formed in the river, unless the owner of the lankas claimed permission to cultivate the same and permission was refused. Mere demand alone would not give rise to a cause of action for mesne profits: 11 M.L.W. 256, Dist. (*Phillips and Odgers, JJ.*) SECRETARY OF STATE *v.* SATYANARAYANA VARAPRASADA RAO. **118 I.C. 273= A.I.R. 1929 Mad. 520.**

MADRAS SALT ACT (4 of 1889).

—S. 11—'Transfer.'

The policy of the Salt Act is to give the Commissioner control as to the person who is to acquire an interest. The word 'transfer' in S. 11 of the Salt Act is not limited to absolute ownership, but applies to transfers by way of mortgage also. (*Kumaraswami Sastri and Devadoss, JJ*). GUJJA NAGAMMA *v.* SECY. OF STATE. **66 I. C. 356=1922 M. W. N. 166= 31 M. L. T. 61=16 M. L. W. 295= A. I. R. 1922 Mad. 106=42 M. L. J. 318.**

—S. 84—Unpaid duty.

Rule 81 imposes on the licensee (and consequently on his transferee) the liability to pay the duty in order to get an order for delivery. If the duty is not paid, it is due from him and recoverable, in the first instance, from any money owing to him by the Commissioner or from any salt belonging to him that may not have been removed. Failing recovery in either of those ways, it is recoverable as an arrear of land revenue. (*Waller, J.*) SECRETARY OF STATE *v.* P. A. MADURAI CHETTY. **103 I. C. 347= 39 M. L. T. 17=1927 M. W N. 302= A. I. R. 1927 Mad. 1152=53 M. L. J. 148.**

MAD. SETT. NOTIFICATION (1910), Cl. 36—Additional Assessment.

—S. 85—'Duty in force.'

Held, that it being laid down in a rule framed under S. 85, that the duty payable is that in force at the time of removal, the respondent cannot escape from the operation of that rule by alleging that, but for certain restrictions, he might have removed the salt earlier. (*Waller, J.*) SECRETARY OF STATE *v.* P. A. MADURAI CHETTY. **103 I.C. 347=39 M.L.T. 17= 1927 M.W.N. 302=A.I.R. 1927 Mad. 1152= 53 M.L.J. 148.**

MADRAS SALE OF MINOR'S ESTATES REGULATION (10 of 1831.)

—S. 2—Scope—

———*The section covers joint Hindu family property of minors got by survivorship whether registered or not—Madras Act (II of* 1864), *S.* 63—*Minor.*

Joint Hindu family property devolving to a minor by survivorship is covered by S. 2 of Madras Regulation X of 1831. The regulation applies to all minor owners of properties irrespective of their being registered or not. The application of the regulation is not limited to only registered minor owners of property, by S. 63 of Madras Act (II of 1864), (*Ramesam and Reilly, JJ.*) K. KRISHNA REDDY *v.* V. T. RAMAKRISHNAYYA CHETTY. **85 I.C. 873=48 Mad. 288= 20 M.L.W. 791=1925 M.W.N. 49= A.I.R. 1925 Mad. 253=47 M.L.J. 667.**

MADRAS SETTLEMENT NOTIFICATION (1910.)

—Cl. 36—Additional Assessment.

Where the Notification containing the conditions of settlement provided: "The resettlement will remain in force for the usual period of thirty years and the rates of assessment now sanctioned will remain unchanged for that period. Government reserve to themselves the right to revise on the expiry of the said thirty years the assessment on land in such manner as may then seem just and proper . . . The thirty years' limit does not apply to lands the irrigation of which may be improved by Government subsequent to the resettlement nor to lands which may be converted from "dry" to "wet" or "manavari". Modifications may also be made in the case of lands in the waterspread of tanks.

Held: that so long as lands registered as dry were cultivated with dry crops it would obviously be unfair and opposed to the whole scheme of the settlement that their assessments should be enhanced, but there would be nothing harsh or unreasonable in providing that, if during the period of the settlement, the pattadar should raise valuable wet crops on lands registered as dry, that is, as bearing the much less valuable dry crops, he should be called upon to pay at the higher rates, that the reservation as to lands which might be converted from dry to wet or manavari was inserted for the purpose of meeting such a case, and that conversion meant conversion by the pattadar and only reserved a power to increase the assessment where there had been a conversion.

Held: further, that the fact that wet crops may have been raised on these lands prior to the settlement was not the governing consideration and that the Government had the power to increase such assessment even after their method of imposing statutory water-cess under the supposed reservation under the notification had been found to be illegal. (*Sir John Wallis.*) SECRETARY OF STATE *v.* RAMANUJA CHARIAR. **111 I.C. 197=51 Mad. 611=55 I.A. 331=**

MAD. STATE PRISONERS REGULATION (1819) —Application of.

28 M.L.W. 384=48 C.L.J. 500=33 C.W.N. 61= 1928 M.W.N. 822=A.I.R. 1928 P.C. 221= 55 M.L.J. 281.

MADRAS STATE PRISONERS REGULATION (2 of 1819.) —Application of.

Because judicial proceedings are started the regulation does not become inapplicable. Statement in the warrant that the necessary reasons exist in the opinion of the Governor-in-Council is sufficient and conclusive (see S. 2, cl. 3) and it is not open to the High Court to consider the correctness of the statement. (*Ramesam and Wallace, JJ.*) ETAKANDAN KUNHOKKER *v.* EMPEROR. 76 I.C. 187= 18 M.L.W. 517=33 M.L.T. 17=1923 M.W.N. 741= 25 Cr. L.J. 123=A.I.R. 1924 Mad. 372= 45 M.L.J. 473.

MADRAS SURVEY AND BOUNDARIES ACT (4 of 1897.) —S. 4—Jurisdiction.

Where the effect of an order of the survey officer right or wrong was a register as a government service Inam land which had hitherto been enjoyed as Jeroyati land, *Held*, that the Act 4 of 1897 does not authorise the survey officer to do anything of that sort and therefore his decision was an erroneous decision being given upon a matter which he had no jurisdiction to deal with. (*Spencer, J.*) GANAPATHI RAJU *v.* RAMAMURTHY. 97 I.C. 842= 1927 M.W.N. 187=24 M.L.W. 334= A.I.R. 1926 Mad. 1045.

—S. 12—Scope.

S. 12 (c) only means that there can be no further dispute about the boundary that has to go into the survey. But it will be going too far to say that that boundary is to be binding for all purposes so that it cannot be questioned by either of the parties in a Court of law. (*Wallis, C. J., and Sadasiva Aiyar, J.*) VENKATRAYUDU *v.* RAMAMURTI.

61 I.C. 986=44 Mad. 340=1921 M.W.N. 117= 13 M.L.W. 451=A.I.R. 1921 Mad. 63= 40 M.L.J. 149.

—S. 13—Applicability.

S. 13 applies only when there is a dispute as to any boundary and it is settled by a competent officer. (*Phillips, J.*) MUNICIPAL COUNCIL, COCHIN *v.* BAVU DEVUSSI. 92 I.C. 18=22 M.L.W. 671= A.I.R. 1926 Mad. 235.

—S. 13—Finality of decision.

Under S. 13 a decision of a Survey Officer under S. 12 becomes final if no suit is brought within one year to establish the rights claimed in respect of boundary of the property surveyed; but the section requires that the party should be a party to a boundary dispute or some person claiming under him, and that the right he claims must be in respect of the boundary of the property surveyed. Any such decision is not binding on a person who is not a party to the dispute. (*Spencer, J.*) GANPATIRAJU *v.* RAMAMURTHI. 97 I.C. 842=1927 M.W.N. 187= 24 M.L.W. 334=A.I.R. 1926 Mad. 1045.

—S. 13—Limitation.

A party to the dispute or to the appeal or one on whom the notice of the appeal has been served in a revenue case, must bring his suit within one year from the order of the survey authorities and not from the doing of an official act such as the actual demarcation of the land.

A dispute involves something, in which two persons participate and where there is nothing to show that the plaintiff and defendant were ever arrayed against each other in the case, they cannot be said to have been parties to any dispute. (*Oldfield and Ramesam, JJ.*) SUBRAMANIA MUDALI *v.* MEENAKSHI AMMAL. 70 I.C. 481=16 M.L.W. 149= 31 M.L.T. 145=A.I.R. 1922 Mad. 392= 43 M.L.J. 194.

MAD. TALUK BOARD ELECTION RULES. R—1 —Scope.

—S. 13—Powers of Survey officer.

The Act of 1897 gives no power to the Board of Revenue to fix the limits of the Unions. The Survey Officer has no power to alter the effect of the notifications of 1896 declaring the limits of the Union. (*Reilly, J.*) PRESIDENT, UNION BOARD *v.* NARAYANA. 113 I.C. 276=28 M.L.W. 657= 1 M. Cr. C. 345=30 Cr.L.J. 116=12 A.I.Cr.R. 83= A.I.R. 1928 Mad. 1261=55 M.L.J. 718.

—S. 13—Survey officer's decision.

The Survey Officer's finding is conclusive between the parties, unless the party aggrieved brings a suit to displace it within 12 months. (*Coutts-Trotter and Ramesam, JJ.*) KUPPUSWAMI IYER *v.* VENKATASWAMI. 70 I. C. 672=16 M. L. W. 99= 31 M. L. T. 62=A. I. R. 1923 Mad. 29.

—S. 20—Tenant.

The grantee of a rent free inam in a *zamindari* is not a tenant within the meaning of S. 20, Cl. (3). (*Ayling, Offg.C.J., Kumaraswami Sastri and Odgers, JJ.*) RAJAH OF VENKATAGIRI *v.* SUBBIAH. 70 I.C. 564= 45 Mad. 1=30 M.L.T. 52=14 M.L.W. 589= 1921 M. W. N. 783=A. I. R. 1922 Mad. 137= 41 M. L. J. 530 (F.B).

—(8 of 1923).

—S. 13—Conclusiveness.

———*Criminal trial—Survey Officer making order determining boundaries of suit land—Criminal Court can go behind such order to determine question of ownership to suit land, if not already decided by civil suit.*

Where no civil suit has been filed to determine the question of the ownership of the land against the order of a Survey Officer under S. 13, or where such suit being brought its result is not known, a criminal court is not debarred from going into the question as to the ownership of the land in respect of which prosecution is launched before the expiry of three years from the date of the Survey Officer's order. (*Devadoss, J.*) PALIMUTHU *v.* PRESIDENT, UNION BOARD. 112 I. C. 589=28 M. L. W. 653= 29 Cr. L. J. 1085=1 M. Cr. C. 325= 52 Mad. 609= A. I. R. 1928 Mad.1278= 56 M. L. J. 360.

MADRAS TALUK BOARD ELECTION RULES. —R. 1—Scope.

———*Valid nomination paper rejected—Party has a right to sue—Election.*

Where the rules enact that no voter shall be at liberty to nominate more candidates than there are vacancies, what is sought to be prevented is that no voter shall nominate a larger number of candidates than there are vacancies and not that a voter shall be forbidden from subscribing more than one nomination paper in favour of the same candidate. There was but one vacancy and the voter put forward but one candidate.

Held; that R. 33 of the Election Rules did not not take away the right of action which the plaintiff had, the Local Government having made no order under the said rule: A. I. R. 1923 Mad. 475, Foll. (*Venkatasubba Rao, J.*) KOTAYYA *v.* TALUK BOARD, NARASARAOPET.

MAD. TOWNS NUISANCES ACT, (1889) S. 3—Jurisdiction.

118 I. C. 289=30 M.L.W. 345=A. I. R. 1929 Mad. 607=57 M. L. J. 40.

MADRAS TOWNS NUISANCES ACT (3 of 1889).

—S. 3—Jurisdiction

An offence under S. 3 (12) of the Act III of 1889 falls within Cl. 2, R. 1 of the rules for the guidance of Bench Magistrates and the Magistrates have jurisdiction to dispose of the case. (13 Mad. 142 Foll.) (*Krishnan, J.*) RAMASWAMI CHETTIAR *v.* MUTHUVELU MUDALI. **71 I.C. 238=45 Mad. 843=1923 M.W.N. 57=16 M.L.W. 562=31 M.L T. 420=24 Cr. L.J. 110=A.I.R. 1923 Mad. 191.**

—S. 6—Common gaming house.

The term 'common gaming house' must at least imply that the house was one used as a place of public resort. A common gaming house is one in which a large number of persons are invited habitually to congregate for the purpose of gaming and it makes no difference that the house was not open to all persons who might be desirous of using the same for gaming. (*Venkatasubba Rao, J.*) KRISHNASWAMY NAIDU *In re* **77 I.C. 303=41 Mad. 426=19 M.L.W. 219=1924 M.W.N. 237=34 M.L.T. 195=25 Cr. L.J. 367=A.I.R. 1924 Mad. 729=46 M.L.J. 309.**

—S. 6—Elements of the offence.

To constitute an offence under Ss. 6 and 7 the house must be proved to be a common gaming house, and to be a common gaming house, a house must be a public place of resort where a number of people are in the habit of resorting as a place well-known to them where they can get what they want in the way of gambling: A.I.R. 1924 Mad. 729, Rel. on. (*Odgers, J.*) RAMASWAMI IYER *v.* EMPEROR. **119 I.C. 165=1929 M.W.N. 267=2 M. Cr. C. 155=30 Cr. L.J. 1009=1929 Cr. C. 80=A.I.R. 1929 Mad. 603.**

—S. 7.—Common gaming house.

"Common gaming house" means a place of public resort where a number of persons are invited to congregate for the purpose of gaming: A.I.R. 1924 Mad. 729, Rel. on.; 15 Hals. 584, Foll. (*Curgenven, J.*) KANDASAMI CHETTI *v.* EMPEROR. **122 I.C. 788=1930 Cr. C. 17=31 Cr. L.J. 459=30 M.L.W. 721=1929 M.W.N. 793=3 M. Cr. C. 27=A.I.R. 1930 Mad. 128.**

MADRAS VILLAGE COURTS ACT (I of 1889 as amended by 2 of 1920)

—Procedure.

The C.P. Code does not apply to proceedings before village Courts and we cannot expect litigants in such Courts to adopt the procedure which it lays down. (*Curgenven, J.*) ARUMUGHA NADAR *v.* VYYAPURI CHETTI. **A.I.R. 1930 Mad. 795.**

—S. 5—Judge.

Village Court executing decree by distraint is Court and the Village Munsif if he himself distrained, is Judge so as to attract provisions of S. 197, Cr. P. Code. (*Jackson, J.*) SUBHA NAIDU *v.* EMPEROR. **115 I.C. 53=1929 M.W.N. 67=29 M.L.W. 579=2 M. Cr. C. 59=30 Cr. L.J. 402=12 A.I. Cr. R. 370=A.I.R. 1929 Mad. 256=56 M.L.J. 600.**

—S. 5—Scope—

The second proviso of the definition of "District Munsif" contained in S. 5 is evidently intended to deal with cases where the decree-holder wishes to execute the village Court's decree as a small cause decree in a locality where the District Munsif does not possess small cause powers and has therefore to present it in a Court which is the Small Cause Court for the locality. (*Waller and Madhavan Nair, JJ.*) AMIRTHA NADAN *v.* MUTHU NADAN. **121 I.C. 842=52 Mad. 961=30 M.L.W. 368=1929 M.W.N. 623=A.I.R. 1929 Mad. 805=57 M.L.J. 453.**

MAD. VILLAGE COURTS ACT (1889) S. 51—Scope.

—S. 7—Appointment of Village Munsif.

Person acting as Village Munsiff appointed as Tribune Officer—Appointment is good. (*Devadoss, J.*) SAKARAIYAPPA *v.* SAMUSUKANI. **110 I.C. 389=A.I.R. 1928 Mad. 1192.**

—S. 13—Cognizance of Suits.

——*Suit for damages.*

Suits for damages for breach of contract are not included in suits triable by village Courts. They are different from "claims for money due on contract." (*Curgenven, J.*) ARUMUGHA NADAR *v.* VYYAPURI CHETTI. **A.I.R. 1930 Mad. 795.**

——*Suit for subscriptions.*

Where for a long time the defendant and his ancestors have been paying the subscription and on the strength of the subscription expenses were incurred in celebrating a festival in a temple, there is an implied contract to pay the amount from time to time and suit to enforce the same will lie to the Village Panchayat Court. But the direction in such suit that the future payments should be paid regularly is illegal. A.I.R. 1923 Mad. 330 Dist. (*Devadoss, J.*) RASALINGAM ASARI *v.* NALLAYAN ASARI. **118 I.C. 511=A.I.R. 1929 Mad. 295.**

——*'Personal property.'*

A suit for the value of damaged crops lies in a village Court. Personal property is not defined in the Act and presumably, it means moveable property which includes growing crops according to the Transfer of Property Act. (*Jackson, J.*) SUNDARA NAICKER *v.* POTTI NAICKER. **98 I.C. 552=50 Mad. 494=24 M.L.W. 611=1926 M.W.N. 953=A.I.R. 1927 Mad. 192=51 M.LJ. 561.**

—S. 13—Scope.

Where neither the plaintiff nor the defendant on record is a minor, bar under S. 13 does not apply. (*Anantakrishna Ayyar, J.*) MUTHU VELU *v.* GOVINDASWAMI. **117 I.C. 304=A.I.R. 1929 Mad. 781.**

—S. 21—Transfer of suits.

Where under S. 21 the District Munsif orders an *interim* stay of the trial of a suit in Village Munsif's Court, but the latter Court decides the case before the District Munsif's order is communicated to it, there remains no suit which can be transferred for trial and so the District Munsif has no jurisdiction to set aside the Village Munsif's order. (*Cornish, J.*) JOSYULA VENKATESWARALU *v.* KASTURI SESHAGIRI RAO. **A.I.R. 1930 Mad. 708.**

—S. 48—Transfer.

A District Munsif receiving by transfer a decree of Village Munsif's Court cannot transfer it to another District Munsif. The general powers of transfer under the Civil Procedure Code cannot apply except in so far as were made applicable by the Madras Act itself: A.I.R. 1923 Mad. 651, Foll. (*Madhavan Nair and Curgenven, JJ.*) NAINDA PUJARI *v.* NARNA SHETTY. **39 M.L.T. 606=A.I.R. 1927 Mad. 1186.**

—S. 51—Scope.

Section 51 clearly permits, in conformity with its tenor, attachment under S. 68 of immovable property in execution of a village Court decree, and an application for execution based on that section must be on the Original Side because it asks for reliefs which can only be given on the Original Side. S. 66, therefore must be read as empowering a District Munsif to execute a village Court decree as if it were an Original Side decree passed by himself. (*Waller and*

MAD. VILLAGE COURTS ACT, (1889), S. 52 —Attachment.

Madhavan Nair, JJ.) AMIRTHA NADAN *v.* MUTHU NADAN. **121 I.C. 842=52 Mad. 961=30 M.L.W. 368=1929 M.W.N. 623=A.I.R. 1929 Mad. 805=57 M.L.J. 453.**

—S. 52—Attachment.

A village Court cannot attach crops which are not moveables within the meaning of S. 52 by virtue of Madras General Clauses Act. (*Jackson, J.*) NALLAMADAN CHETTIAR *v.* EMPEROR. **1930 M.W.N. 352=31 M.L.W. 719=3 M. Cr. C. 143=A.I.R. 1930 Mad. 509=58 M.L.J. 509.**

—S. 53—Security bond.

Since the C. P. Code does not apply to the village Courts at all, a security bond taken by a village Court under S. 53 of the Madras Village Courts Act cannot be treated as a bond under that Code, and hence it cannot fall within Art. 6 of Sch. 2 to the Court-fees Act : A.I.R 1923 Mad. 651, Foll. Such a bond falls under Art. 46 of Sch. 1-A of Madras Stamp Act. (*Krishnan, Ramesam and Beasley, JJ.*) CHEEDELLA CHENCHAYYA *v.* ONNUREDDI PICHIREDDI. **100 I.C. 545=25 M.L.W. 246=38 M.L.T. 125=1927 M.W.N. 281=A.I.R. 1927 Mad. 377=52 M.L.J. 153 (F.B.)**

—S. 66—Re-transfer of decrees.

A District Munsif, receiving by transfer a decree of a village Court under Section 66 of the Madras Act I of 1889 or withdrawing execution of a decree to his own file under Section 67 has no jurisdiction to transfer it for execution to another District Munsif's Court under Section 39, Civil Procedure Code. The Act is intended to supply a complete Code of procedure for village Courts ; and there is therefore no reason for importing into that procedure the provisions of another statute, the Civil Procedure Code, the less so as the reference to transmission is in Section 66 against such importation. (*Oldfield and Devadoss, JJ.*) SANKARAN NAIR *v.* ATCHUTHAN. **73 I.C. 793=46 Mad. 734=18 M.L.W. 19=32 M.L.T. 403=1923 M.W.N. 353=A.I.R. 1923 Mad. 651=44 M.L.J. 643.**

—S. 73—Discretion.

A District Munsif has the widest discretion under S. 73 and even, if facts are established bringing the case within one of three categories which may warrant revision as set forth in the section, he may still exercise his discretion whether he will interfere. (*Jackson, J.*) SUNDARA NAICKER *v.* POTTI NAICKER. **98 I.C. 552=50 Mad. 494=24 M.L.W. 611=1926 M.W.N. 953=A.I.R. 1927 Mad. 192=51 M.L.J. 561.**

—S. 73—Error of law.

According to S. 73, as amended, the Court is not bound to interfere even if there is an error of law unless the decree is unjust, or in other words, if substantial justice has been done. Error of law should not be a ground for interference by the District Munsif. (*Kumaraswami Sastri and Wallace, JJ.*) RAMACHANDRA RAJU *v.* MARIYAMMA. **111 I.C. 304=A.I.R. 1928 Mad. 980.**

—S. 73—Late stage.

The action of the District Munsif in declining to interfere with the order of the Panchayat on the ground that the petitioner could have made the application at an earlier stage as he had been aware of the ill-feeling existing between him and some of the Panchayatdars even during trial, is not warranted by the provisions of S. 73. (*Devadoss, J.*) VASUDEVA SHANABHAG *v.* DAMODARA SHANABHAG. **110 I.C. 113 Mad.**

MAD. VILLAGE POLICE REGULATION (1816) S. 10—Imprisonment.

—S. 73—Subordinate Court.

High Court can under S. 115, C. P. Code, revise the order of the District Munsif under S. 73 of the Village Courts Act, as the District Munsif acts as a Court subordinate to the High Court: 21 Mad. 363 and 24 Mad. 335, Ref. (*Ramesam, J.*) RAMA RAO *v.* NALLARI PITCHAYYA. **104 I.C. 415=1927 M.W.N. 420=39 M.L.T. 25=A.I.R. 1927 Mad. 786=53 M.L.J. 131.**

—S. 73—Unjust decision.

The omission of the words "or contrary to law" in sub-S. 3, S. 73 by the Amending Act of 1920 shows that a decree may be just though contrary to law and a decision though contrary to law need not be unjust. (*Ramesam, J.*) K. RAMA RAO *v.* N. PITCHAYYA. **104 I.C. 415=1927 M.W.N. 420=39 M.L.T. 25=A.I.R. 1927 Mad. 786=53 M.L.J. 131.**

—S. 76—Revision.

The High Court cannot interfere with the order of a Panchayat Court under Ss. 435 and 439 of the Cr. P. Code. But under S. 107 of the Government of India Act the High Court has powers of supervision over all the criminal and civil Courts in the Presidency, and when a grave error of a Panchayat Court which is not governed by the provisions of the Cr.P.Code appears on the face of the record the powers given by S. 107 of the Government of India Act could be invoked to correct such error.

Where the judgment of a Panchayat Court convicting a person under S. 426 of the Penal Code, does not mention the value of the amount of loss or damage alleged to have been caused, the High Court will set aside the judgment in the exercise of its powers of superintendence under S. 107 of the Government of India Act. (*Devadoss, J.*) MUNIGADU *v.* EMPEROR. **88 I.C. 521=1925 M.W.N. 600=26 Cr. L. J. 1161=A.I.R. 1925 Mad. 1144.**

MADRAS VILLAGE POLICE REGULATION. (Mad. Reg. 11 of 1816.)

—Procedure.

It is entirely contrary to the spirit of the regulation that a court acting in accordance with it should be required to adopt the ordinary rules relating to conduct of criminal cases, so long as it observes the fundamental dictates of justice, equity and good conscience. (*Curgenven, J.*) SUPPAN CHETTI *v.* KING-EMPEROR. **105 I.C. 801=26 M.L.W. 555=39 M.L.T. 450=1927 M.W.N. 786=28 Cr. L.J. 977=9 A.I. Cr. R. 140=A.I.R. 1927 Mad. 1022=53 M.L.J. 526.**

—S. 10—Confinement.

The Village Magistrate has power only to enforce the sentence of confinement in the village choultry and nowhere else. (*Abdur Rahim, J.*) PONNUSWAMI PILLAI, *In re.* **60 I.C. 64=44 Mad. 113=22 Cr.L.J. 208=A.I.R. 1921 Mad. 410.**

—S. 10—Imprisonment.

A Village Magistrate can sentence a person for certain offences to confinement in the village choultry for a period not exceeding 12 hours, but such a sentence of imprisonment must be either in the choultry or nowhere at all. Therefore a sentence of imprisonment in village common is illegal : A.I.R. 1921 Mad. 410, Foll. (*Curgenven, J.*) SUPPAN CHETTI *v.* KING-EMPEROR. **105 I.C. 801=26 M.L.W. 555=39 M.L.T. 450=1927 M.W.N. 786=28 Cr.L.J. 977=9 A.I. Cr. R. 140=A.I.R. 1927 Mad. 1022=53 M.L.J. 526.**

MAHANT.
See HINDU LAW—RELIGIOUS ENDOWMENT.
MAHOMEDAN LAW.
Acknowledgment, doctrine of—*See* MAH. LAW-LEGITIMACY.
Administration.
Advancement—*See* TRUSTS ACT, Ss. 81 & 82.
Applicability.
Bequest—*See* MAH. LAW-WILL.
Conjugal Rights—*See* MAH. LAW—MARRIAGE.
Conversion.
Co-owner—*See* MAH. LAW—PRE-EMPTION.
Co-heirs.
Custom.
Divorce.
Dower.
Endowment—*See* MAH. LAW—WAKF.
Family arrangement.
Gift.
Guardianship.
Heir—*See* MAH. LAW—SUCCESSION.
Husband and Wife—*See* MAH. LAW—MARRIAGE.
Iddat—*See* MAH. LAW—DIVORCE.
Illegitimacy—*See* MAH. LAW—LEGITIMACY.
Increase, doctrine of—*See* MAH. LAW—SUCCESSION.
Inheritance—*See* MAH. LAW—SUCCESSION.
Joint Family.
Legitimacy.
Maintenance.
Marriage.
Mosque—*See* MAH. LAW—WAKF.
Mutwali—*See* MAH. LAW—WAKF.
Partition.
Pre-emption.
Religious Endowment—*See* MAH. LAW—WAKF.
Religious office—*See* MAH. LAW—WAKF.
Restitution of Conjugal Rights—*See* MAH. LAW—MARRIAGE.
Return, Doctrine of—*See* MAH. LAW—SUCCESSION.
Succession.
Texts.
Wakf.
Will.

—Administration.

A suit by the widow of a deceased Mahomedan, asking that the extent of property of deceased may be ascertained, that his outstandings may be realized, that his estate may be administered, that her, mehar may be paid and that the residue divisible among his heirs may be divided according to their shares under the law, is an administration suit and is not a suit for mere partition : 39 Bom. 545 ; A. I. R. 1921 Bom. 424 ; and 28 I.C. 895, Rel. on : 28 Mad. 216, Dist. (*Venkatasubba Rao, J.*) MT. AMIR BI *v.* ABDUL RAHIM SAHIB.
110 I.C. 276=28 M. L. W. 583=
A. I. R. 1928 Mad. 760=55 M. L. J. 266.

———*Right to sue,*

Where a Mahomedan dies, one of the heirs is entitled to bring a suit for accounts and administration and is not bound to sue for partition even although he knows exactly what the estate consists of. (*Macleod, C. J., and Heaton, J.*) ESSAFALLY ALIBHAI *v.* ABDEALI GULAM HUSSAIN. **59 I. C. 396=**
45 Bom. 75=A. I. R. 1921 Bom. 424.

—Applicability.

———*Onus.*

Where a party alleges that the members of its family are governed by custom and not by Mahomedan law, but both the parties reside in Lahore, their source of income being service at a shrine and they do not follow agricultural pursuits, the burden is on such party to prove that they are governed by agricultural custom and not by Mahomedan law, even though the parties belong to a dominant agricultural tribe : A. I. R. 1927 Lah. 642, Ref. (*Tek Chand and Agha Haidar, JJ.*) MUHARRAM ALI *v.* BARKAT ALI.
A. I. R. 1930 Lah. 695.

Law applicable in trial of suits shall be law of defendant : A.I.R. 1925 All. 720, Foll. ; 4 All. 205 Rel. on, (*Ananta Krishna Ayyar, J.*) MANDY MATHAR SAHIB *v.* BIJAN BI. **121 I.C. 846=**
A.I.R. 1930 Mad. 234.

———*Power to will.*

Where power to will is established under customary law, the Court has no power to assume that the principles of Mahomedan law applied to wills, merely because the parties are Mussalmans by religion. (*Addison and Bhide, JJ.*) KAMIR *v.* HAIDAR.
111 I.C. 377=29 P.L.R. 618=
A.I.R. 1928 Lah. 940.

———*Cutchi Memons.*

There is a presumption that Muslims are governed by Muhammadan Law, and if a person alleges that Cutchi Memons are governed by Hindu Law by custom, the burden of proving the custom lies on him and the onus will be discharged by proof of actual instances in which the alleged custom has been followed. (*Tyabji, A.J.C.*) TULSHIDAS KESHEODAS *v.* FAKIR MAHOMED. **93 I.C. 321=19 S.L.R. 376=**
A.I.R 1926 Sind 161.

———*Marwari Shilawatha community.*

Among the Marwari Shilawatha community no custom exists overriding the rules of Mahomedan Law and excluding females from inheritance. (*Kennedy, J. C., and Raymond, A.J.C.*) USMAN *v.* ASAT. **78 I.C. 23=18 S.L.R. 149=**
A.I.R. 1925 Sind 207.

———*Pathans of Kutel.*

Pathans of the village Kutel in the District of Karnal are governed by Mahomedan Law in matters of inheritance. (*Zafar Ali, J.*) KHAN MOHAMMED KHAN *v.* MUSSAMAT NUR JAHAN BEGUM.
82 I.C. 609=6 L.L.J. 340=
A.I.R. 1924 Lah. 731.

———*Questions as to Mosque.*

It is a matter of justice and right and also a matter of justice, equity, and conscience to apply Muhammadan Law to questions raised in a Muhammadan community relating to a Muhammadan mosque and tomb. (*Marten, J.*) ADVOCATE-GENERAL, BOMBAY *v.* YUSUF ALI EBRAHIM. **84 I.C. 759=**
24 Bom. L.R. 1060=A.I.R. 1921 Bom. 338.

—Conversion.

———*Kutchi Khatis—Custom of having retained Hindu Law by Cutchi Khatis was found not established.*

The Kutchi Khatis being a Mahomedan community, the presumption is that after conversion they were governed by Mahomedan Law with regard to inheritance and succession. The custom of having retained the Hindu Law in this respect was found not established : A.I.R. 1917 P.C. 181, Ref. (*Aston, A.J.C.*) NIAMAT *v.* ABDUL RAHMAN. **A.I.R. 1930 Sind 193.**

Hindu family converted to Islam retains Hindu customs relating to marriage and inheritance. (*Wazir Hasan and Pullan, JJ.*) BINAIK DAT *v.* MOHAMAD GHAFUR KHAN. **105 I.C. 496=**
4 O.W.N 770=A.I.R. 1927 Oudh 442.

———*Apostacy—Non-essentials—Deviation from, will not constitute.*

Where the fundamental principles of Mahomedan

MAHOMEDAN LAW—Conversion.

MAHOMEDAN LAW—Coheirs.

Law are accepted and there is a deviation in non-fundamental particulars only, such deviation will not amount to apostacy. Ahmadiyans are not apostates. (*Oldfield and Krishnan, JJ.*) NARENTAKATH AVULLAH *v.* PARAKKAL MAMMU. **71 I.C. 65=45 Mad. 987=16 M.L.W. 626=1922 M.W.N 662=24 Cr. L.J. 17=A.I.R. 1923 Mad. 171. 43 M.L.J. 663.**

—Co-heirs.

———*Adverse Possession.*

Where the possession of a person is the possession of a co-owner, he cannot put an end to that possession by secret intention and gain an adverse title as against the other co-owners. Nothing short of ouster can bring about that result. Further co-heirs in Mahomedan Law are in the position of tenants-in-common and entry and possession of one of such co-heirs must be deemed to be on behalf of all co-heirs. A Mahomedan co-heir claiming adverse title on ground of adverse possession must prove ouster of the party claiming possession. The ouster must be to the knowledge of the persons who would be affected thereby: A. I. R. 1929 Lah. 195; A. I. R. 1929 Lah. 464; A. I. R. 1929 Lah. 549; A.I.R. 1924 All.,384; A.I.R. 1922 Bom. 150 and A. I. R. 1927 Lah. 886 Rel. on. (*Addison, J.*) GHULAM MUHAMMAD *v.* MT. BEGAM. **122 I.C. 105=31 P.L.R. 113=A.I.R. 1930 Lah. 251.**

If one of many co-owners be in possession of an estate, then he must be deemed to be in possession on behalf of the other co-owners and cannot claim that he has extinguished the right of the other co-owners by the mere fact of his possession unless he can show that his possession became adverse to the others and remained so for more than 12 years to their knowledge; in other words, unless he can show that he did some overt act which amounted to a notice to his co-owners that he was holding the property adversely to them. (*Jailal and Agha Haidar, JJ.*) MT. UMATULLA BIBI *v.* ABDUL KARIM. **119 I.C. 335=A.I.R 1930 Lah. 78.**

A joint owner is legally entitled to retain possession of joint property. Even if he is in exclusive possession of such joint property his possession is ordinarily to be referred to his legal title. The other co-owners, are accordingly in constructive possession of the property. If, therefore, the co-owner in actual possession dispossesses any one of the other co-owners, the suit that is brought for recovery of possession is not a suit for a distributive share of the property of an intestate but is a suit to recover possession of the defined though undivided, share of the co-owner in the possession of the other co-owners. Such a suit is not covered by Art. 123 at all and must fall under Art. 144, limitation running from the date when the defendants' possession became adverse. A.I.R. 1928 All. 467, (F.B.) Foll. .A.I.R. 1921 Bom. 56 Ref. A.I.R. 1924 Rang. 155, Dist. (*Mya Bu and Bagulcy, JJ.*) MA BI *v.* MA KHTOON. **121 I.C. 785=7 Rang. 744=A.I.R. 1930Rang. 72.**

———*Alienation by one—Adjustment of equities in favour of the purchaser.*

Where an alienation is made of property by one of several co-sharers, it is open to a court while setting aside the alienation to so adjust the equities as to enable the vendee to retain the portion sold to him. (*Curgenven, J.*) PAKKIRI MAHOMED ROWTHER *v.* BAVA MOIDEEN. **98 I.C. 790=1926 M.W.N. 919=A.I.R. 1927 Mad. 82.**

———*Position.*

On the death of a Muhammadan his heirs became co-owners in his estate according to respective shares. (*Jailal and Agha Haidar, JJ.*) MT. UMATULHABIBI

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v. ABDUL KARIM. **119 I.C. 335=A.I.R. 1930 Lah. 78.**

When a Mahomedan owner dies leaving several heirs, they all become co-owners and tenants-in-common. (*Mya Bu and Eaguley, JJ.*) MA BI *v.* MA KHTOON. **121 I.C. 785=7 Rang, 744=A.I.R. 1930 Rang 72.**

———*Payment to one does not operate as a valid discharge.*

Upon the death of a Mahomedan usufructuary mortgagee, his estate devolves upon a number of heirs and each of such heirs has a distinct and defined interest in the mortgaged property; and payment to one of the heirs without the concurrence of the rest, cannot operate as a valid discharge of the mortgage debt: *Decharms* v. *Harwood*, 10 Bing. Reports 526; 25 All. 155; 27 Bom. 292 and 32 All. 164, Rel. on (*Sen and Niamutullah, JJ.*) RAM AUTAR KURMI *v.* GHULAM DASTGIR. **115 I.C. 646=51 All. 589=1929 A.L.J. 355=A.I.R. 1929 All. 250.**

———*Limitation Act, S. 7—Right to set aside alienation.*

The rights of Mahomedan co-heirs to set aside alienation made by father are independent of each other. The fact therefore that the eldest brother of the minor plaintiff can no longer sue does not affect the right of the plaintiff to sue: A.I.R. 1926 P.C. 16, Rel. on: A.I.R. 1921 Bom. 289 and 38 Mad. 118 (F.B.), Dist. (*Addison, J.*) GHULAM RASUL *v.* HUSSAIN BEG. **122 I.C. 92=A.I.R. 1929 Lah. 582.**

———*Heirs in possession—Rights.*

The heirs of a deceased Mahomedan actually in possession of his property can create a valid mortgage of the property which would bind all the heirs, if the money is borrowed for purposes necessary or beneficial to the estate. (*Chari, J.*) V. M. R. V. CHETTYAR FIRM *v.* ASHA BIBI. **118 I.C. 407=A.I.R. 1929 Rang. 107.**

———*Co-heirs—Adverse possession.*

When a Mahomedan owner dies leaving several heirs they all become co-owners and tenants-in-common. A joint owner is legally entitled to retain possession of joint property. Even if he is in exclusive possession of such joint property, his possession is ordinarily to be referred to his legal title. The presumption therefore is that his possession is lawful and therefore on behalf of all the co-owners. The other co-owners are accordingly in constructive possession of the property. As distinct shares have devolved on them, they all are presumed to have taken their legal shares although possession still remains joint. If therefore the co-owner in actual possession dispossesses any one of the other co-owners, the suit that is brought for recovery of possession is not a suit for a distributive share of the property of an intestate, but is a suit to recover possession of the defined, though undivided, share of the co-owner in the possession of the other co-owners. Such a suit is not covered by Art. 123 at all, and must fall under the general Art. 144, limitation running from the date when the defendant's possession became adverse. A. I. R. 1916, P. C. 145, Expl., A.I.R. 1926 All. 748, Reversed. Other cases Considered. (*Sulaiman, Ag. C. J., Mukerji and Boys, JJ.*) RUSTAM KHAN *v.* MT. JANKI. **111 I.C. 809=51 All. 101=26 A.L.J. 1041=A.I.R. 1928 All. 467 (F.B.)**

———*Father cannot obtain adverse possession of sons' property because of their joint living.*

When the father is the natural guardian of his sons and maintains them out of the common fund, and all dine together in the same house there will, in those circumstances, normally be no question of

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rendering accounts and thus the father cannot acquire a title by adverse possession, as against his sons, of the property owned by the latter. (*Findlay, J.C.*) MAYADAD KHAN *v.* HAZARILAL.

108 I.C. 435=A.I.R .1928 Nag. 275.

——*Alienation by co-sharer—Alienee—Rights.*

A purchaser of an interest of a Mahomedan co-sharer should sue for partition other co-sharers or their alienees within 12 years of the coming into existence of his rights : 29 Mad. 294 and 28 M.L.J. 642, Foll. (*Waller and Madhavan Nair, JJ.*) AHMADKUTTY *v.* C. MOIDUTHY. **105 I.C. 414= 39 M.L.T. 281=A.I.R. 1927 Mad. 952.**

Where two of the heirs are in possession of more than their share and their mortgaging the shares as their own is recognized by the other heir, the heirs in possession of excess shares are to be deemed in adverse possession. (*Campbell, J.*) KARAM DIN *v.* MEHR DIN. **94 I.C. 550=8 L.L.J. 129= 27 P.L.R. 252.**

——*Alienation—Presumption.*

Prima facie a Muhammadan dealing with property, owned in common deals only with what he is entitled to deal with, *viz.*, his own share. (*Odgers, J.*) ABDUL SAMAD KHAN *v.* BIBIJAN. **91 I.C. 618= 1925 M.W.N. 543=A.I.R. 1925 Mad. 1149= 49 M.L.J. 675.**

——*Relationship.*

There is no fiduciary relation between the co-owners under the Muhammadan Law. (*Odgers, J.*) ABDUL SAMAD KHAN KHILADAR *v.* BIBIJAN ALIAS HANIFA KHATHU. **91 I.C. 618=1925 M.W.N. 543= A.I.R. 1925 Mad. 1149=49 M.L.J. 675.**

——*Position.*

Heirs of a Mahomedan are co-sharers and unless express ouster is proved to the knowledge of the other party no limitation starts against the other party. (*Lindsay and Kanhaiya Lal, JJ.*) MUBARAK UNNISSA *v.* MUHAMMAD RAZA. **79 I.C. 174=46 All. 377= 22 A.L.J. 307=6 L.R.A. Civ. 257= A.I.R. 1924 All. 384.**

——*Sale by heir for paying ancestral debts affects only his share.*

Under Muhammadan law, there is no representation of the family, as under the Hindu Law, by the *Karta* or the head so as to bind the other members of the family by his acts. As soon as succession opens under Mahomedan law, each heir gets his specified share in the inheritance. The act of one of the heirs meddling with the property of the deceased is not binding upon the other heirs, and a sale by him for discharging the debt due by the ancestor would *prima facie* pass only his share in the property. (*Walmsley and Suhrawardy, JJ.*) SUKUR MAHAMED *v.* ASMOT MANDAL. **79 I.C. 491=50 Cal. 978= A.I.R. 1924 Cal. 384.**

Decree against one of the heirs of deceased debtor —Other heirs are not bound—Doctrine of representation in Hindu Law does not apply. (*Macleod, C. J. and Crump, J*) LALA MIYA *v.* MANNBIBI **73 I.C. 246= 25 Bom. L.R. 408=47 Bom 712= A.I.R. 1923 Bom. 411.**

——*Liability for.*

Where funeral expenses are paid out of the estate, by the heir in possession, he is not entitled to contribution from other heirs for a proportionate share of the expenses. (*Baker, J.C.*) Rahmat Bi v. Bhuri Bi. **73 I.C. 959=6 N.L.J. 161=A.I.R. 1923 Nag. 307.**

——*Adverse Possession.*

The heirs of a deceased Muhammadan take as tenants-in-common and the right of one heir to a share will not become barred, unless and until the

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other heirs set up an adverse right to the knowledge of that heir. 34 Mad. 511 and 29 I. C. 275 Foll. 89 P.R. 1888 Dist. (*Broadway, J*) MURAD BIBI *v.* RAHIM BAKHSH. **59 I.C. 346=20 P.L.R. 1921= A.I.R. 1921 Lah. 197.**

—One heir, being sole surviving male member, taking charge is presumed to do so as agent for co-heirs and on his own behalf. 1 S.L.R. 133 ; 2 S. L. R. 43 Foll. (*Kincaid, J. C. and Raymond, A. J. C.*) MT. BHAGHARI *v.* MT. KHATAMAL **80 I.C. 118= 16 S.L.R. 25=A.I.R. 1921 Sind 177.**

—Custom.

The custom giving an exclusive right to Kazis to write and register marriage contracts and divorces is invalid as opposed to Muhammadan Law. (*Fawcett and Madgavkar, JJ.*) KASAMKHAN *v.* KAJI ABDULLA **93 I.C. 135=50 Bom. 133= 28 Bom. L.R. 49=A.I.R. 1926 Bom. 153.**

——*Exclusion of daughters from inheritance.*

Even among Mahomedans, daughters can be excluded from inheritance by custom. An entry in a *Wajib-ul-arz* coupled with entries in the Khewat to the effect that for four generations at least daughters will be excluded from inheritance, is very strong evidence of the custom. A single instance of divergence from the custom observed throughout the period for which the family history is known does not abrogate the custom. But a custom of inheritance must appertain to a "family and not to a locality. The word immemorial means beyond human memory and a period of hundred years is sufficient to make a custom immemorial. (*Pullan, A. J. C.*) MAJID HUSAIN *v.* MT. SAFDARI BEGAM. **81 I.C. 1033=A.I.R. 1925 Oudh 55.**

—Divorce—Anti-nuptial agreement.

——*Breach of condition—Right to divorce—Notice not necessary.*

At the time of marriage the husband executed in favour of his wife a kabinnamah whereby he delegated to his wife the power to exercise the right of divorce in her own favour under certain conditions. One of these conditions was that the husband would not by his conduct give his wife or her parents or relative pain in mind. Shortly after marriage the wife left the husband and went away to parents' house. He instituted criminal proceeding against the wife and her parents which proved frivolous. The wife then, under the powers given to her by the kabinnamah, intimated her intention to exercise her power of divorce by a notice, which the husband did not receive.

Held : whether husband received the notice or not was immaterial. Breach of the conditions in kabinamah gave absolute right of divorce on the happening of the condition mentioned therein and the validity of the dissolution of marriage was not in any way affected by non-service of the notice. (*Pearson and Chakravarti, JJ.*) SRIMATI SAMSERANNESSA *v.* ABDUS SAMAD. **93 I. C. 1018=43 C. L. J. 176= A. I. R. 1926 Cal. 1144.**

—Agreement by husband at the time of marriage to obey all his wife's wishes and to serve the wife as a servant is not unreasonable—Agreements in oriental language should be construed reasonably and in intelligent manner.

An agreement by a husband at the time of marriage, which gives a power to the wife to divorce herself even if the husband demurs to carry out her most unreasonable wishes, and provides that the husband will serve his wife as a servant, is not so unreasonable in its nature as would not be countenanced by any Court of Law,

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Where an agreement has been drawn up in an oriental language between a husbaud and a wife at the time of marriage, the words used in a document on such occasions are not to be construed too literally, but in a reasonable and intelligent manner. (*Moti Sagar, J.*) MT. SAHRA JAN *v.* ABDUL RAOOF. **3 L. L. J. 519=A. I. R. 1921 Lah. 194.**

——*Breach of.*

A wife is entitled to divorce her husband under an agreement providing for divorce in the event of the husband taking another wife or she can obtain a decree of Court for divorce on the ground of habitual cruelty or failure to perform the marital duties and obligation or to fulfil engagements voluntarily entered into at the time of marriage. (*Robinson, J.*) KHALI LAL RAHMAN *v.* MARAIN BIBI. **59 I. C. 804= 13 Bur. L. T. 89=10 L. B. R. 194.**

—Divorce—By compulsion.

——*Validity.*

According to the Hanafi School a divorce pronounced under compulsion is valid and such divorce is nonetheless valid because it is contained in a written document provided such document is addressed to the party to be divorced and provided it actually pronounces the divorce and is not merely an acknowledgment of something agreed to under compulsion.

A compromise signed by the husband and by the wife, and registered and addressed by the husband to the wife, is not an acknowledgment but a document which actually effects the divorce. (*Greaves and Cuming, JJ.*) JORINA AKTAR *v.* HAFEZUDDIN KHAN. **90 I. C. 633=30 C. W. N. 178= A. I. R. 1926 Cal. 242.**

——*Untrue acknowledgment of divorce is ineffective.*

An acknowledgment of a divorce, as distinct from the pronouncement of the divorce itself, obtained under compulsion is wholly ineffective if it is proved that it was in fact untrue. (*Sulaiman, J.*) NUR BIBI *v.* ALI AHMAD. **88 I. C. 408= 6 L. R. A. Civ. 329=A. I. R. 1925 All. 550.**

—Divorce—Cause of action.

The opinions expressed in the judgment of the suit for restitution of conjugal rights as to the affirmation of cruelty or the negation of divorce cannot form a cause of action in a suit for dissolution of marriage or for declaration of dissolution. (*Wazir Hasan, A.J.C.*) MUHAMMED HAMIDULLAH KHAN *v.* MT. FAKHIRIJAHAN BEGAM. **65 I.C. 452=8 O. L. J. 650= A. I. R. 1922 Oudh 109.**

—Divorce—Deed of.

A deed of divorce is not defective merely because it is not signed in the presence of the wife. 8 W. R. 23 Foll. (*Sulaiman, J.*) NUR BIBI *v.* ALI AHMAD. **88 I.C. 408=6 L. R. A. Civ. 329= A. I. R. 1925 All. 550.**

—Divorce—Effect of.

——*Divorce or death—Relationship between the parties ceases.*

Under the Mahomedan Law death or divorce dissolves the tie between husband and wife. On the happening of either event the relationship between the parties ceases. Much more would it be so in the case of a woman who after the death of her first husband marries into another family. (*Rafique and Piggott, JJ.*) JAHANGIR KHAN *v.* SYED ABDUR RAHMAN. **64 I. C. 943=20 A. L. J. 56= A. I. R. 1923 All. 128.**

——*Wife's right to succession.*

Where a Mahomedan husband in health pronounces an irrevocable divorce and dies within the period of his wife's *iddut*, she has no claim to inherit to her husband. (*Kincaid, J. C, and Raymond, A. J. C.*) MT. BHAGHARI *v.* MT. KHATUMAL. **80 I.C. 118= 16 S.L.R. 25=A.I.R. 1921 Sind 177.**

—Divorce—Form of.

Dissolution by Talak hasan—Only one declaration proved—Parties continuing as husband and wife—Children born from wife recognized by husband as his—Marriage is not dissolved. (*Shadi Lal, C.J. and Aha Haider, J.*) GHULAM MOHUDDIN *v.* KHIZAR HUSAIN. **114 I.C. 74= 10 Lah. 470=30 P.L.R. 7=A.I.R. 1929 Lah. 6.**

——*Oral divorce.*

According to Mahomedan law, a husband can effect a divorce whenever he desires. He may do so by words without any talaknama or written document, and no particular form of words is prescribed. If the words used are express or well understood as implying divorce, such as talak, no proof of intention is required. If the words used are ambiguous, the intention of the user must be proved. It is not necessary that the repudiation should be pronounced in the presence of the wife, or even addressed to her. (*Sir John Wallis.*) MA MI *v.* KALLANDER AMMAL. **100 I.C. 1= 5 Rang. 18=54 I. A. 61=25 A.L.J. 65= 38 M.L.T. 41=1927 M. W. N. 80=25 M.L.W. 342= 28 P.L.R. 109=45 C. L. J.263=31 C.W.N. 621= 8 P.L.T. 280=6 Bur. L.J. 40=29 Bom. L.R. 800= A.I.R. 1927 P.C. 15=52 M.L.J. 376.**

——*Triple form—Necessity for.*

When the language of the document clearly indicates that the intention is to make an irrevocable divorce it is not necessary that the triple form should be used. (*Sulaiman, J.*) NUR BI BI *v.* ALI AHMAD. **88 I. C. 498=6 L. R. A. Civ. 329= A. I. R. 1925 All. 550.**

——*Oral divorce.*

Where the husband's object at the time was to effectuate a divorce by a written document, where he had no intention whatsoever of effecting an oral divorce on the spot in the wife's absence and the words he used were simply explanatory of that writing and were not intended by him in any way to effect the divorce,

Held, that though he had the intention of divorcing his wife, yet had no intention of divorcing her by word of mouth at the time and in consequence the words which he uttered did not effect the oral divorce. (33 M. 22, *Foll.*) (*Young and Baguley, JJ.*) KALENTHER AMMAL BY HER ATTORNEY A. S. MEERA LABBI MARICAIR *v.* MA MI. **84 I. C. 175= 2 Rang. 400=3 Bur. L. J. 172= A. I. R. 1924 Rang. 363.**

——*Talak by registered deed—Miscarriage—Effect.*

Where a Muhammadan divorced his wife by registered *Talaknama*, but pronounced the legal formula and delivered the deed eight days afterwards, *Held*, the divorce took effect from the date of the writing and not from the date of its receipt by the wife, unless there were words in the instrument which show a different intention. The period of *iddat* commences, therefore from the date of the execution of the deed of divorce. (*Mookerjee and Panton JJ.*) MOHAN MOLLA *v.* BARU BIBI. **64 I. C. 704= 34 C. L. J.524=26 C.W.N. 261=A.I.R. 1922 Cal. 21.**

—Divorce—Ground For.

——*Ground of impotency—Virginity.*

If the hymen is intact (not even lacerated), the probabilities, except in the case of females below the age of puberty, are very strongly in favour of virginity; and the inference of virginity becomes almost certain, if the membrane is normal in position and structure and its aperture is of small size and undilatable and if accompanying this condition of the

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hymen, the other signs of virginity are present, *e, g.*, the condition of the breasts, the vagina and the fourchette. (*Kanhaiya Lal, J.*) MT. ATTAPAN *v.* IBRAHIM. **75 I. C. 502=21 A. L. J. 811=4 L. R. A. Civ. 561=A. I. R. 1924 All. 116.**

—Divorce—Iddat.

A who was married to *B* applied under S. 488, Cr. P. Code, for maintenance. *B* proceeded to divorce her before Court. The question arose as to whether *A* could be granted maintenance and for what period.

Held: that *A* could obtain maintenance against *B* during the period of Iddat and was entitled to it for three months: 5 *All.* 226 and 19 *All.* 50, *Rel. on.*; 17 *O. C.* 260, *Dist.* (*Stuart, C. J.*) MT. MARIAM *v.* KADI BAKHSH. **6 O. W. N. 942=1929 Cr. C. 625=A. I. R. 1929 Oudh 527.**

——*Place of observance.*

Under Mahomedan Law it is not necessary that the divorced wife should observe her iddat in her husband's house. She should observe it wherever she happens to reside at the time of her divorce. (*Marten, C. J. and Patkar, J.*) USMANBHAI SAMADBHAI *v.* BAI SAKINA. **100 I. C. 1021=29 Bom. L. R. 106=A. I. R. 1927 Bom. 176.**

——*Period for pregnant widow.*

The period prescribed for the *Iddat* of a widow on the death of a regularly married husband if she is not pregnant, is 4 months and 10 days, and if pregnant four months and ten days or until delivery, whichever is longest. The period fixed is not curtailed if the delivery takes place before the expiry of the period of four months and ten days. (*Broadway and Moti Sagar, JJ.*) JHANDU *v.* MT. HUSAIN BIBI. **73 I. C. 390=4 Lah. 192=5 L. L. J. 401=A. I. R. 1923 Lah. 499.**

——*Talak by registered deed—Miscarriage—Effect.*

Where a Muhammadan divorced his wife by registered *Talaknama*, but pronounced the legal formula and delivered the deed eight days afterwards,

Held, the divorce took effect from the date of the writing and not from the date of its receipt by the wife, unless there were words in the instrument which show a different intention. The period of *iddat* commences, therefore, from the date of the execution of the deed of divorce.

If a Muhammadan woman is pregnant at the time of her divorce and miscarries, the period of *Iddat* would be terminated. (*Mookerjee and Panton, JJ.*) MOHAN MOLLA *v.* BARU BIBI. **64 I. C. 704=34 C. L. J. 524=26 C. W. N. 261=A. I. R. 1922 Cal. 21.**

—Divorce—Impotency.

Where the wife seeks dissolution of marriage on the ground of impotency of the husband then where the parties have not had an opportunity of cohabiting, 12 months should be allowed to the husband to disprove his impotency. (*Boys, J.*) PIR BAKSH *v.* MAHOMED UNNISSA. **98 I. C. 514=A. I. R. 1927 All. 100.**

——*Right of the husband to have a year to prove falsity of the charge—Substantive right.*

The rule entitling a husband whose wife sues for separation on the score of impotency to an opportunity for a year more to demonstrate the falsity of the charge, is one of substantive law not superseded by British Law though the other parts of the rule concerning the method of taking evidence, etc., are procedural and unenforcible at the present day.

The doctrine of the Mahomedan Law, that where a woman brings her husband before a judge, and

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demands a separation on the ground of impotence and alleges that she is still a virgin, the case is to be adjourned for a year and if after the expiry of that year the woman still alleges that she is a virgin, an inspection by women is to be ordered, and if they declare that she is not a virgin, then her claim should be dismissed, but if they declare that she is a virgin then that fact coupled with a statement on oath should be accepted, is partly a rule of mere procedure and partly one of substantive law.

The method prescribed for bringing the husband before a Kazi and the way in which the evidence is to be recorded and the rule of the law regarding what weight is to be attached to that evidence are rules of procedure, superseded by British Law. But the right of the husband to have an opportunity of demonstrating that he is not impotent is not a rule of procedure but a substantial right recognized by the Mahomedan Law. (*Sulaiman and Mukerji, JJ.*) MOHD. IBRAHIM *v.* MT. ALTAFAN. **83 I.C. 27=47 All. 243=22 A.L.J. 1045=6 L.R.A. Civ. 55=A.I.R. 1925 All. 24.**

——*Wife's right to.*

Divorce is not absolute but subject to certain conditions—The mere fact of husband not having intercourse since marriage does not *ipso facto* entitle her to divorce unless husband's incapacity to cohabit with her is proved and the Mahomedan Law contemplates the contingency of there being impotency regarding one woman though not regarding others. (*Sulaiman and Mukerji, JJ.*) MOHD. IBRAHIM *v.* MT. ALTAFAN. **83 I.C. 27=47 All. 243=22 A.L.J. 1045=6 L.R.A. Civ. 55=A.I.R. 1925 All. 24.**

—Divorce—Laan—

——*False charge of adultery against wife—Conditional retraction is not retraction in law and wife is entitled to decree.*

A person preferred a false charge of adultery against his wife. He made a conditional retraction in the course of the pleadings in the suit brought by the wife for dissolution of marriage.

Held, that such conditional retraction was no retraction in law and wife was entitled to a decree for dissolution of marriage. 41 All. 278, Relied on. (*Subhedar, A. J. C.*) ABDUL RAHIMAN *v.* MT. SHAH BIBI. **118 I.C. 680=A.I.R. 1929 Nag. 262.**

——*Retraction can nullify the effect on marriage tie.*

There is no material difference between the Shia law and the Sunni law on the question of retraction of accusation of adultery by the husband in respect of its effect on the dissolution of the marriage tie. Such a retraction can nullify the effect of imputation of adultery and the marriage cannot be dissolved. (*Gokaran Nath Misra and Shrivastava, JJ.*) MT. FAKHRE JAHAN BEGAM *v.* MD. HAMIDULLAH KHAN. **114 I.C. 314=5 O.W.N. 936=4 Luck. 168=A.I.R. 1929 Oudh. 16.**

——*True accusation of laan is no ground for divorce.*

One of the conditions laid down under the Mahomedan law in respect of laan entitling wife to a divorce is that she should be innocent. If, therefore, the accusation is true, the wife cannot maintain a claim for divorce on that ground. A.I.R. 1928 Bom. 285. Rel. on. (*Gokaran Nath Misra and Shrivastava, JJ.*) MT. FAKHRE JAHAN BEGAM *v.* MD. HAMIDULLAH KHAN. **114 I.C. 314=5 O.W.N. 936=4 Luck. 168=A.I.R. 1929 Oudh 16.**

——*Right of "laan"—Adulterous wife is not entitled to divorce.*

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Where an illegitimate child is in existence, no room is left for the right or the procedure of "laan". An innocent wife who proves that her husband falsely charged her with adultery is alone entitled to a divorce, and not the wife who is proved to be guilty: 41 All. 278, A.I.R. 1927 All. 56. Ref. (*Madgavkar and Patkar, JJ.*) KHATIJABIBI *v.* UMAR SAHEB.
110 I.C. 131=52 Bom. 295=30 Bom. L.R. 447=A.I.R. 1928 Bom. 285.

—Wife can apply to a Court for dissolution of marriage on the ground of her having been falsely accused of adultery by her husband. 41 All. 278 Expl. and Foll. (*Mears, C. J. and Sulaiman, J.*) MT. RAHIMAN BIBI *v.* FAZUL.
98 I.C. 573=48 All. 834=24 A.L.J. 881=A.I.R. 1927 All. 56.

——*Proper retraction.*

For a proper retraction the husband must acknowledge that he had falsely accused his wife and that he must be punished on his own acknowledgment. (*Mears, C. J., and Sulaiman, J.*) MT. RAHIMAN BIBI *v.* FAZUL.
98 I.C. 573=48 All. 834=24 A.L.J. 881=A.I.R. 1927 All. 56.

—Suit for divorce by wife on the ground of her being falsely charged of adultery by husband is maintainable. 41 All. 278 Foll. (*Addison, J.*) MAHOMED HUSAIN *v.* BEGAM JAN.
93 I.C. 1017=A.I.R. 1927 Lah. 155.

—Divorce—Law applicable.

——*Parties belonging to different sects—Law of defendant is to be applied.*

In a suit by a Shia against his or her Sunni spouse for dissolution of marriage, the question at issue should be determined by reference to the law of the sect to which the defendant belongs. (*Gokaran Nath Misra and Shrivastava, JJ.*) MT. FAKHRE JAHAN BEGAM *v.* MD. HAMIDULLAH KHAN.
114 I.C. 314=4 Luck. 168=5 O.W.N. 936=A.I.R. 1929 Oudh 16.

——*Original Islamic law should be followed in spirit in the present circumstances.*

In the changed circumstances of the present day it cannot be possible to follow the letter of the original Islamic law. But the spirit of the law should be kept in view and the principles underlying it should be adhered to as far as possible; 41 All. 278, Foll. (*Gokaran Nath Misra and Shrivastava, JJ.*) MT. FAKHRE JAHAN BEGAM *v.* MD. HAMIDULLAH KHAN.
114 I.C. 314=4 Luck. 168=5 O.W.N. 936=A.I.R. 1929 Oudh 16.

—Divorce—Post-nuptial agreement.

——*Validity.*

An agreement for talak may be entered into after the marriage. Such post-nuptial delegation is valid: 46 Cal. 141, Rel. on. (*Cuming and Mukerji, JJ.*) MT. FATIMA KHATEM *v.* FAZLALKARIM MEA.
110 I.C. 52=47 C.L.J. 372=A.I.R. 1928 Cal. 303.

—Divorce—Talak-ul-bidaat.

Talak-ul-bidaat is usually pronounced by the triple repetition of the formula of talak, and though the marriage may be dissolved by a single declaration, it must be accompanied by a clear manifestation of an intention to dissolve it irrevocably. (*Shadi Lal C. J., and Aga Haider, J.*) GHULAM MOHIUDDIN *v.* KHIZAR HUSAIN.
114 I.C. 74=10 Lah. 470=30 P.L.R. 7=A.I.R. 1929 Lah. 6.

—Talak-ul-bidaat, *i.e.*, the irregular divorce where a husband repudiates his wife by three divorces at once, is a valid and binding form of divorce according to the law of the Hanafis, and when pronounced thrice, it becomes irrevocable. (*Courtney Terrell, C. J., Jwala Prasad and Fazl Ali, JJ.*) FAZLUR RAHMAN *v.* MT. AISHA.
115 I.C. 546=10 P.L.T. 109=8 Pat. 690=A.I.R. 1929 Pat. 81 (F.B.),

——*Plea of invalidity—Onus of proof.*

In the talak-ul-bidaat the husband may pronounce three formulæ at one time whether the wife be in a state of *tahr* (purity) or not. But even if it be assumed that the state of purity is one of the necessary conditions of a valid divorce, even then the onus of proving that the wife was not in a state of *tahr* will be on the husband where he desires to plead that the divorce was not valid. (*Courtney-Terrell, C.J. Jwala Prasad and Fazl Ali, JJ.*) FAZLUR RAHMAN *v.* MT. AISHA.
115 I.C. 546=10 P.L.T. 109=8 Pat. 690=A.I.R. 1929 Pat. 81 (F.B.)

—Dower—
Amount of.
Charge for.
Essentials for.
Interest on.
Liability for.
Limitation for.
Nature of.
Payment of.
Transfer for.
Widow's lien.
Wife's lien.
Miscellaneous.

—Dower—Amount of.

——*Proportion to husband's means.*

It is not uncommon for the dower of a Muhammadan wife to be fixed at a figure which is out of all proportion to the husband's means. (*Mohiuddin and Jackson, A. J. C. s.*) KULSAMBI *v.* BILANKHAN.
117 I.C. 220=A.I.R. 1929 Nag. 121.

—A dower can be fixed at a period later than the celebration of the marriage: A. I. R. 1926 Oudh 186 and 3 All. 266 (P.C.), Foll. (*Wazir Hasan, Ag. C.J. and Pullan, J.*) MT. AMINA BIBI *v.* MD. IBRAHIM.
114 I.C. 504=4 Luck. 343=5 O. W. N. 1077=A. I. R. 1929 Oudh 520.

——*No dower fixed at marriage—It can be fixed at a later period.*

If no dower is fixed at marriage, it may be fixed at a later period.

Where a husband undertakes to pay a certain sum in discharge of his obligation for the dower debt, question for the Sharai dower does not arise: A.I.R. 1927 Oudh 194 and A.I.R. 1926 Oudh 186, Foll. (*Wazir Hasan, J.*) GHANI AHMOD KHAN *v.* MT. MEHDI BEGAM
1 L.C. 645=A.I.R. 1927 Oudh 317.

——*Man of well-known family marrying prostitute—No presumption as to amount of dower arises—Wife can obtain only* sharai *dower where no amount is proved.*

When a man of a well-known family marries a prostitute, there can be no presumption as to the amount of dower that he would be likely to give her. It is a case for proof and not for presumptions, and when there is no reliable evidence to show that the husband agreed to pay any specified amount as dower at the time of the marriage, *Sharai* dower only can be given under the law to the wife. (*Stuart, C. J., and Wazir Hasan, J.*) MT. JADDO BEGAM *v.* NAWAB SHARF JAHAN BEGAM.
102 I. C. 838=4 O. W. N. 450=A. I. R. 1927 Oudh 194.

—Suit for—Plaintiff basing her claim on contract but failing to establish—Amount admitted by defendant can only be decreed. 105 P. R. 1914 Foll. (*Harrison and Jai Lal, JJ.*) MT. BHURI *v.* MT. ASGHARI BEGAM.
94 I.C. 959=7 Lah. 441=8 L.L.J. 521=27 P.L.R 660=A.I.R. 1926 Lah. 458.

MAHOMEDAN LAW—Dower—Amount of.

———*Age of Majority.*

A Mahomedan, who is a major under the personal law, though not under the Majority Act can fix the amount and nature of dower 41 M. 1026 not followed. (*Suhrawardy and Duval, JJ.*) MOZARUL ISLAM *v.* ABDUL GANI ALA. **80 I.C. 914=A.I.R. 1925 Cal. 322.**

—Dower—Charge for.

———*Widow ranks as ordinary creditor only.*

A widow claiming dower from her deceased husband's estate is in no better position than any ordinary creditor and a *bona fide* purchaser for value from the heirs would get an unassailable title. (*Sir George Lowndes*). SAIYAD QA-SIM HUSAIN *v.* HABIBUR RAHMAN. **117 I.C. 10=8 Pat. 926=56 I.A. 254=1929 A.L.J. 777=31 Bom. L.R. 879=33 C.W.N. 926=30 M.L.W. 198=6 O.W.N. 613=50 C.L.J. 187=1929 M.W.N. 673=10 P.L.T. 851=A.I.R. 1929 P.C. 174=57 M.L.J. 361.**

—Decree for dower debt does not create a charge on the husband's property in the hands of his heirs. (*Ross and Kulwant Sahay, JJ.*) MUHAMMAD HABIBUR RAHMAN *v.* QASIM HUSSAIN. **95 I.C. 367=7 P.L.T. 664=1926 P.H. C. C. 178=A.I.R. 1926 Pat. 404.**

———*Widow's right to—does not amount to a charge.*

A Mohammadan widow is a creditor to her sons to the extent of her dower debt. Her right is created on the date of her marriage and that right has precedence over the right of a person subsequently obtaining a decree against the estate for *mesne* profits. Her right to the dower debt does not amount to a charge on the property but if she is in possession at the death of her husband she is entitled to remain in possession until the debt is paid. If she wishes to forestall other creditors and obtain what is due to her first in furtherance of her wish, her action is not fraudulent. (*Kendall, A.J.C.*) ZAMIN HUSAIN KHAN *v.* TASADDUQ ALI KHAN. **80 I.C. 692=A.I.R. 1925 Oudh 171.**

———*Dower debt is not a charge and widow cannot prevent another creditor of her husband from recovering his debt from the estate.*

A dower debt is not a secured debt nor a charge but a simple debt ranking equally with other debts due from the estate. The widow's lien for dower is the right which she has, where she has taken peaceable possession of her husband's estate, to hold that estate as against the heirs of her husband until they satisfy her claim to dower. It has no application to the share which she holds in her own right as heir of her husband, still less can it give her a right to prevent another creditor against her husband's estate from recovering the amount which is due to him. 18 O.C. 263 Ref. (*Ryves and Daniels, JJ.*) KANEEZ FATIMA BEGUM *v.* RAM NANDA. **73 I.C. 977=21 A.L.J. 269=45 All. 384=4 L.R.A. Civ. 181=A.I.R. 1923 All. 331.**

Dower—Essentials for.

To support a claim for dower very satisfactory evidence is absolutely essential : 7 W.R. 495, Foll. (*Sen and Niamatallah, JJ.*) MAHAMMAD ZAHUR AHSAN *v.* MT. MAIMUNA. **116 I.C. 481=1929 A.L.J. 284=A.I.R. 1929 All. 142.**

Dower—Interest on.

———*Discretion.*

Some discretion is allowed to the Courts in determining whether interest should be allowed on dower debt and the disproportion between the value of the property and the dower is a good ground for holding that interest cannot equitably be allowed. (*Mears C. J. and King, J.*) MT. NAWASI BEGAM *v.* MT. DILFAROZ BEGAM. **98 I.C. 978=48 All. 803=24 A.L.J. 910=A.I.R. 1927 All. 39.**

MAHOMEDAN LAW—Dower—Limitation for.

———*Interest claimed—Allowance of 6 per cent. granted, not strictly as interest but to safeguard claimant's position.*

Where in a suit for dower due to a Muhammadan wife, interest was claimed :

Held, that the representatives of the wife are entitled to an allowance, not strictly as interest, but as the means of preventing her position being adversely prejudiced by the unsuccessful controversy raised by the husband's heirs as to her rights and might be fixed at 6 per cent. 38 All. 581 (P.C.), Ref. to. (*Lord Buckmaster*). MT. FAKRUNISA *v.* MOULVI IZAMS SADIK. **63 I.C. 898=25 C.W.N. 866=17 N.L.R. 72=A.I.R. 1921 P.C. 55,**

Dower—Liability for.

———*Deferred Dower,*

The liability to pay deferred dower is a liability which binds the husband during his lifetime and binds his estate after his death, and unless it is established that the wife has renounced her claim to dower, the debt can be recovered if it is not proved to have been satisfied. (*Stuart, C.J. and Raza, J.*) FAKHRI JAHAN BEGAM *v.* SHAROF JOHAN BEGAM. **112 I.C. 315=5 O.W.N. 753=A.I.R. 1928 Oudh 460.**

———*Marriage of minor—Father is not liable for dower as surety.*

A father simply by giving his consent to the marriage of his minor son does not automatically become a surety for the payment of the dower debt. (*Dalal and Pullan, JJ.*) MAHOMED SIDDIQ *v.* SHAHAB-UD-DIN. **100 I.C. 636=49 All. 557=25 A.L.J. 466=A.I.R. 1927 All. 364.**

———*Liability of heirs to pay dower debt is proportionate.*

Where a Muhammadan widow is in possession of her husband's entire estates the heir who sues the widow for possession of his share is only liable to pay the proportionate part of the dower debt (33 All. 182 F.B., Foll.) and not the whole of the dower.

Where funeral expenses are paid out of the estate, by the heir in possession, he is not entitled to contribution from other heirs for a proportionate share of the expenses. (*Baker, J.C.*) RAHMAT BI *v.* BHURI BI. **73 I.C. 959=6 N.L.J. 161=A.I.R. 1923 Nag. 307.**

Dower—Limitation for.

———*Exigible dower can only be claimed within three years of demand or death of husband.*

An obligation to pay exigible dower can only be lost by lapse of time if a demand has been made and refused in clear and unambiguous terms more than three years before the suit or if more than three years have elapsed after the death of the husband (*Tekchand, J.*) ABDUL HAMID *v.* SARDAR BEGAM. **121 I.C. 372=A.I.R. 1930 Lah. 202.**

———*Dower debt—Execution of a mortgage in lieu of—Limitation.*

A registered deed executed by Mahomedan husband long after the marriage, promising to pay dowry then still due from him, on demand and hypothecating certain immovable properties as security for its due payment, converts the dower debt into a mortgage debt ; and to a suit on such deed for the amount of the dowry, six years' rule of limitation is applicable. 6 M. I. A. 211, P. C., Dist. (*Iqbal Ahmad, J.*) MT. KUBRA BEGAM *v.* FAZAL HUSAIN. **99 I.C. 553=A.I.R. 1927 All. 268.**

———*Dower secured by a registered deed—Art. 116 applies and not Arts. 103 and 104,*

MAHOMEDAN LAW—Dower—Nature of.

Art. 116 applies to suits for recovery of dower debt when there is a registered dower deed, although Arts. 103 and 104 would apply when there is no such registered instrument and time runs from the date of death of the lady. 44 Cal. 759 P.C., Foll. 36 C.L.J. 379 Ref. 36 Cal. 184, Not Foll. (*Mookerjee and Rankin, JJ.*) MAHAMED MOZAHARAL AHMAD *v.* MAHAMED AZIMADDIN BHUINYA. **73 I.C. 17=37 C.L.J. 108=27 C.W.N. 210=A.I.R. 1923 Cal. 507.**

—Dower—Nature of.

——*Failure to settle at the time of marriage—Effect.*

Where it is not settled at the time of the marriage whether the wife's dower is to be prompt or deferred, part will be prompt and part deferred, the proportion referable to each category being regulated by custom, or, in the absence of custom, by the status of the parties and the amount of the dower settled: 23 Mad. 371, Dist.; 33 All. 291, Foll. (*Das and Adami, JJ.*) MAHBOOBAN BIBI *v.* MD. AMEERUDDIN. **117 I.C. 207=8 Pat. 645=A.I.R. 1929 Pat. 207.**

——*Wife coming to Court with definite case of agreement as to prompt dower—Finding against her—She can still rely on Mahomedan law.*

Although a Mahomedan wife comes to Court with a definite case of an agreement as to prompt dower still it is possible for her to rely upon the Mahomedan law in the event of finding regarding agreement going against her. (*Das and Adami, JJ.*) MAHBOOBAN BIBI *v.* MD. AMEERUDDIN. **117 I.C. 207=8 Pat. 645=A.I.R. 1929 Pat. 207.**

—Dower—Payment of

——*Non-payment of dower is no bar to suit for restitution of conjugal rights.*

There is no reason why a husband should not be entitled to conjugal rights until he had paid dower. Dower is not prompt in all marriages, and when it is prompt the result appears simply to be that the wife can insist on its payment. Therefore non-payment of dower cannot be pleaded as a bar to a suit for restitution of conjugal rights: 8 All. 149, (F.B.); 11 Mad. 327; 17 Cal. 670 and 30 Bom. 122, Rel. on. (*Macnair, A.J.C.*) SK. KASAM *v.* JOHARBI. **123 I.C. 901=26 N.L.R. 178=13 N.L.J. 97=A.I.R. 1930 Nag. 270.**

——*Marriage not consummated—Still dower is payable on wife's death.*

Unless the marriage of a Hanafi Mahomedan is proved as irregular, dower is payable upon the death of the wife, even if there had been no consummation of the marriage. (*Banerji and King, JJ.*) MALIK IFTIKHAR WALIKHAN *v.* SARWARI BEGAM. **115 I.C. 132=A.I.R. 1929 All. 369.**

——*Any money paid by a Shia husband to his wife should not be presumed to be in satisfaction of dower debt.*

It cannot be laid down as a principle that payments of money by a Shia husband to his wife during the continuance of their married life should be presumed to be payments of her dower debt, and it should be for her to establish the contrary. If such a principle were applied to its logical extreme, all the money paid by a Shia husband to his wife during the continuance of her marriage, even when it took the form of trifling sums given out of natural love and affection, would be presumed to be credited to payment of her dower debt unless the contrary was proved. The husband must show that payments which he made were for the direct satisfaction of her dower debt: 7 B.L.R. 643 (P.C.), Cons. and Dist.; 11 M.I.A. 517, Ref. (*Stuart C. J. and Raza, J.*) FAKHR JOHAN BEGAM *v.* SAROF JOHAN BEGAM. **112 I.C. 315=5 O.W.N. 753=A.I.R. 1928 Oudh 460.**

MAHOMEDAN LAW—Dower—Transfer for.

——*Payment of prompt or deferred dower to be made according to agreement or on demand.*

Muhammadan Law enjoins payment of prompt dower at any time before or after consummation of marriage and no condition whatsoever can be lawfully attached to the payment of prompt dower. As regards the deferred portion it is true that ordinarily it is supposed to be payable at death or on dissolution of marriage, but, as observed by Mr. Amir Ali in his Muhammadan Law, Vol. II, page 503, 4th Edn. "There is no rule by which it necessarily follows that postponed or deferred dower becomes realisable on the death of the husband or if he happened to divorce the wife, on such divorce." Also in this particular case the agreement of dower recited that the payment should be made on demand. (*Abdul Qadir, J.*) MT. NAWAB BEGUM *v.* ALLAH RAUHA. **69 I.C. 937=A.I.R. 1922 Lah. 172.**

—Dower—Transfer for

——*Gift or sale.*

A transfer by a Muhammadan of property in lieu of dower debt is a gift and does not require registration. Distinction between transfer as dower, and transfer in payment of a certain amount of dower, pointed out. (*Dalal, J.*) ALI HASAN *v.* MT. RASHIDAN. **124 I. C. 756.**

——*Validity.*

To determine validity of a transfer the question whether the dower was to be prompt or deferred is of minor importance since satisfaction of a deferred dower debt can be a valid consideration for a transfer between the husband and the wife: 8 All, 178, Foll. (*Mohiuddin and Jackson, A.J.Cs.*) KULSAMBI *v.* BILANKHAN. **117 I.C. 220=A.I.R. 1929 Nag. 121.**

——*Property transferred in lieu of dower is not liable to attachment.*

The settlement of the dower debt due to a lady is a legitimate settlement and where it is conducted in a proper manner and there is nothing to show that she had any knowledge of the existence of a previous promissory note by her husband, the property transferred to her is not liable to be attached and sold in execution of a decree on such promissory note. (*Stuart, C. J. and Raza, J.*) RAMCHARAN *v.* MT. ABIDA BEGUM. **101 I.C. 690=4 O.W.N. 456=A.I.R. 1927 Oudh. 176.**

——*Transfer of property in lieu of balance of dower already barred—Effect.*

When a Muhammadan husband has promised a certain amount of dower, the facts that under S. 5 of the Oudh Laws Act, only a less amount would have been decreed if the matter had come before the Courts and that such amount had been already realised by the wife and that even otherwise the claim to the balance of the amount had become barred at the time, cannot invalidate a transfer of property by the husband to the wife in lieu of a portion of the balance. (*Wazir Hasan, A.J.C.*) MT. ZOHRA BIBI *v.* GANESH PRASAD. **78 I.C 106=A.I.R. 1925 Oudh 267.**

—Hibanama to satisfy dower debt of property, title to which was acquired later—Whole property passes to donee. (*C.C. Ghose and Panton JJ.*) RUSTAM ALI MIA *v.* ABDUL JABBAR. **76 I.C. 499=A.I.R. 1923 Cal. 535.**

——*Gift by husband in lieu of dower—Presmuption.*

There is no presumption that a gift of immovable property by a Muhammadan to his wife in lieu of

MAHOMEDAN LAW—Dower—Widow's lien—Extent of

dower is either an absolute gift or only such that the wife is to enjoy the usufruct until the dower debt is paid off. Each case will depend on its own circumstances.

Where the widow is in possession to satisfy herself out of the proceeds for arrears of dower, she should be held to be in possession as a usufructuary mortgagee. In such a case her act cannot alter the nature of the possession so as to make the statute of limitation run against those who are entitled to the equity of redemption. (*Dawson Miller, C. J. and Ross, J.*) HIRA SINGH *v.* SHEIK MASAHEB.

59 I.C. 865=2 P.L.T. 207=1921 P.H.C.C. 147=A.I.R. 1921 Pat. 353.

—Dower—Widow's lien—Extent of.

Widow in possession of husband's estate in lieu of dower cannot retain possession against a secured creditor. (*Kotval, A.J.C.*) MT. ASABI *v.* KANHAIYALAL.

94 I.C. 754=22 N.L.R. 14=A.I.R. 1926 Nag. 307.

—Dower—Widow's lien—Nature of possession.

The right of a widow under Mahomedan law to hold the property of her husband, of which she has lawfully and without force or fraud obtained possession, until her debt is satisfied is founded on her power as a creditor for her dower : 14 M.I.A. 377 ; 32 All. 551 and 32 All. 563, Foll. (*Sulaiman and Ashworth, JJ.*) MOHAMED SOHIBKHAN *v.* MT. ZAIB JAHAN.

26 A.L.J. 110=A.I.R. 1927 All. 850.

——*Widow's lien, consent of her husband or heirs is necessary.*

Consent of the husband or his heirs is necessary to ground the widow's right to lien. (38 All. 581, Foll. and 43 M. 214, Diss.) (*Rankin and B.B. Ghose, JJ.*) SABUR BIBI *v.* ISMAIL SHAIKH.

80 I.C. 294=51 Cal. 124=27 C.W.N. 1013=40 C.L.J. 171=A.I.R. 1924 Cal. 508.

——*Widow's right to retain possession till dower debt is paid.*

A Mahomedan widow whose dower remains unpaid is entitled to retain possession of the properties of her husband which she obtained lawfully, without force or fraud, but without the consent of, or any agreement with the husband or his heirs. 32 A. 563—38 C. 475 ; 43 M. 214; 38 A. 581 ; 17 W.R. 113 (P. C.) Foll.; 17 A. 77 dissent.; 17 A. 93 Ref. (*Campbell J.*) MALAWA RAM *v.* MT. SUNARAU.

71 I.C. 820=A.I.R. 1924 Lah. 402.

——*Consent of husband or his heirs not necessary.*

If a widow has obtained possession of her husband's property lawfully and peaceably without force or fraud, it is not necessary that her possession should be the result of any agreement or consent of her husband or his heirs for claiming a lien for her unpaid dower. 43 Mad. 214 (F. B.); 32 All. 563 and 551, Foll.

The bare fact that some dispute as to possession was raised in the course of the mutation proceedings is not sufficient to show that her possession was not peaceable. (*Daniels and Dalal, A. J. Cs.*) MST. HAFIZ-UN-NISSA *v.* JAWAHIRSINGH.

66 I.C. 24=24 O C. 374=A.I.R. 1921 Oudh 209.

Dower—Widow's lien—Nature of right.

——*Widow in possession of husband's estate in lieu of dower—Nature and extent of her right.*

A Mahomedan widow who holds possession of her husband's property until she has been paid her dower has not estate or interest in the property as has a mortgagee under an ordinary mortgage. There is no real or true analogy between the widow's right of retention and a mortgage usufructuary or other. In the case of a mortgage, the mortgagee takes and retains possession under an agreement or arrangement made between him and the mortgagor. The widow's right of retention is conferred upon her not by the agreement or bounty of her husband but by the Mahomedan law. The right of the widow to retain possession of her husband's property until satisfaction of the dower debt does not carry with it the right of selling, mortgaging or otherwise transferring the property. If she alienates the property itself, and delivers possession thereof to the alienee her husband's other heirs are entitled to recover possession of the property from the alienee without payment to him of the dower debt. This may not affect her right to recover the dower debt from the other heirs of her husband out of his estate. It is doubtful whether a widow could transfer her dower debt or her right to retain possession until the debt was discharged, but an alienation by her of the property itself is void. A transfer by a widow of the property itself cannot be treated as a transfer of her dower debt and the right to hold possession thereof until the debt was paid off. A.I.R. 1925 P.C. 63 and 41 All. 538, Foll. (*Stuart, C.J. and Raza, J.*) SITARAM BIBI *v.* GANESH PRASAD.

101 I.C. 683=2 Luck. 553=4 O.W.N. 330=A.I.R. 1928 Oudh 209.

——*Lien for dower debt gives right to retain possession and not a right to sue for possession if dispossessed—Suit for possession will lie only under Specific Relief Act, S. 9.*

The lien of a Muhammadan widow over property, on account of a dower debt, only operates so long as she remains in possession of the property. On being deprived of possession, she has a right, independently of her lien, to recover possession within six months under the Specific Relief Act. The lien gives her no title, or right to recover possession, but only a right to retain possession : 7 All. 353, not Foll.

Nor (apart from S. 9 of the Specific Relief Act) can the widow rely on the title arising from mere prior possession. Title based on mere prior possession is only available against some one other than the rightful owner. The heir is the rightful owner and the widow, only having a right of lien, has no title. (*Walsh and Ashworth, JJ.*) MASHAL SINGH *v.* AHMAD HUSAIN.

103 I.C. 363=25 A.L.J. 806=A.I.R. 1927 All. 534.

——*Heritability.*

The possession by a widow of her husband's estate in lieu of her dower debt is heritable by her heirs : 32 All. 551 ; 43 All. 127 ; 43 Mad. 214 (F. B.) ; 24 O. C. 374 and 40 Bom. 34, Rel. on. (*Stuart, C. J. and Misra, J.*) AHMAD AZIM *v.* SAFI JAN.

97 I.C. 897=2 Luck. 335=3 O.W.N. Sup. 102=A.I.R. 1926 Oudh 561.

——*Widow's right to retain possession and a mortgagee's right to retain possession—Distinction.*

Where a Mahomedan widow obtains possession of her husband's estate peaceably and without force or fraud, she is entitled to retain possession till her dower debt is paid. This right is not however founded upon any hypothecation by the husband ; on the contrary there is a clear distinction between her right to retain possession, which is created by Mahomedan Law, and the right of mortgagee to possession which is founded on contract. In the case of a mortgage the mortgagee takes and retains possession, under an agreement or arrangement made between him and the mortgagor. Any rights the mortgagee may get are conferred upon him by the mortgagor. In the case of a Mahomedan widow neither the possession of the property nor the right to retain that possession when acquired is conferred by the agree-

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ment or the bounty of her deceased husband. The possession of the property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower-debt is paid is conferred upon her by the Mahomedan Law. The husband, when he grants dower to his wife cannot by any original hypothecation of his property, secure to her the payment of it. But the original and intentional hypothecation of the mortgaged property to secure the re-payment of the mortgage debt is the very essence of every mortgage usufructuary or other. There is no analogy between the two rights.

Quaere :—Whether this right of the widow is a lien in the strict sense of the term. 14 M.I.A. 377 Foll. (*Lord Atkinson.*) MT. MAINA *v.* VAKIL AHMAD. **86 I.C. 579=27 Bom. L.R. 796=23 A.L.J. 115=30 C.W.N. 673=6 L.R.P.C. 25=52 I.A. 145=2 O.W.N. 180=47 All. 250=A.I.R. 1925 P.C. 63=48 M.L.J. 667.**

———*Widow in possession—Each separate heir cannot recover possession by paying proportionate part of dower.*

If a widow is in possession in lieu of dower she is not liable to piece-meal suits by every separate heir. She is entitled to retain the entire property until the entire dower is satisfied; the plea that the heirs should be each allowed to pay his proportionate share of the dower and recover possession piecemeal is bad. (*Daniels, J.*) MT. JAN BIBI *v.* MT. BATULAN BIBI. **78 I.C. 214=A.I.R. 1924 All. 729.**

—Dower—Widow's lien—Presumption.

Possession of widow after husband's death will be presumed to be in lieu of dower. (*Ashworth, J.*) ABDUL SATTAR *v.* MT. AQIDA BIBI. **100 I.C. 599=A.I.R. 1927 All. 319.**

—Dower—Widow's lien—Transfer of.

A Mahomedan widow's right of retention of her husband's property for her dower may be sold: A.I.R. 1925 P. C. 63 Cons. (*Dalal, J.*) KARAM ALI *v.* MD. LATIF. **119 I.C. 445=10 L.R.A. Rev. 291=A.I.R. 1929 All. 326.**

———*Sale by widow—Heir's right to sue for recovery—Accrual on the date of sale.*

Where a Mahomedan widow who was in possession of her husband's property, sold it for Rs. 700 while her dower was only Rs. 51 and further the sale-deed itself made no mention of the amount of dower debt, her intention was to sell not merely the right of retention but the property itself, and hence the right of the heirs to recover accrued on the date of the sale. (*Dalal, J.*) KARAM ALI *v.* MOHAMMAD LATIF. **119 I.C. 445=10 L.R.A. Rev. 291=A.I.R. 1929 All. 326.**

———*Effect.*

If a Mahomedan widow in possession of the estate of her husband in lieu of her dower debt purports to transfer the property itself as distinct from her dower debt or her right to hold possession in lieu of it she loses all right to hold the possession of the property as soon as possession has passed to her transferee and she cannot claim any proprietary interest in the property itself and the right to dispose of it. Such a transfer does not confer any right or title on her transferee to continue in possession.

The possession of such transferee is adverse and by lapse of prescribed time matures into proprietary title. The transferee can then be treated as a co-sharer entitled to pre-emption within the meaning of S. 4 (1), Agra Pre-emption Act and is not in the position of a mortgagee: A.I.R. 1925 P. C. 63, Foll. (*Sulaiman and Pullan, JJ.*) MT. MAHMUDA BIBI *v.* ABDUL HAMID. **120 I.C. 557 (All.)**

MAHOMEDAN LAW — Dower — Widow's lien — Transfer of

———*Validity.*

Where a widow is in possession of her husband's property in lieu of her dower debt and she transfers the property without the debt the transfer of the security is a valid transfer and is binding against the widow, and persons claiming through the widow, as also against the heirs at law, so long as there is a debt due to the widow: A.I.R. 1923 Pat. 33; A. I. R. 1923 Pat. 153; A.I.R. 1926 All. 261, Foll. and A.I.R. 1923 Pat. 72 Dist. (*Das and Kulwant Sahay, JJ.*) MT. SOGIA *v.* MT. KITABAN. **107 I.C. 319=7 Pat. 141=9 P.L.T. 467=A.I.R. 1928 Pat. 224.**

———*Gift.*

Widow in possession of husband's properties in lieu of her dower debt can validly transfer by way of gift her right to dower together with the right to remain in possession in lieu thereof under Mahomedan Law. (*Adami and Kulwant Sahay, JJ.*) ABDUL HAQUE *v.* MT. TAMIZAN. **97 I.C. 154=8 P.L.T. 406=A.I.R. 1927 Pat. 20.**

———*Validity—Transfer by widow in possession of property of her husband is valid until the dower is paid.*

Where a Muhammadan widow is in possession of property belonging to her deceased husband in lieu of dower it is competent to her to sell it without necessarily selling her right to receive her dower. Such a transfer conveys to the transferees the right to remain in possession during the widow's life-time or until the widow's dower or the proportionate party thereof corresponding to the property transferred is satisfied. (*Coutts and Das, JJ.*) NALIJAN *v.* MT. SAHIFAN. **67 I.C. 635=4 P.L.T. 218=A.I.R. 1923 Pat. 153.**

———*Alienation by widow in possession for dower debt—No transfer of dower debt—Alienee cannot retain possession after widow's death as against heirs of widow.*

In an instrument of sale by a Mahomedan widow in possession of her husband's estate in lieu of her dower debt, it was recited that she was in possession both by virtue of inheritance and in lieu of dower debt, and the deed purported only to transfer the proprietary interest and all rights, title and interest which the vendor had in the vended properties but not her dower debt.

Held: the transferee after the death of the widow was not entitled to retain possession of the estate excepting the share to which the widow was absolutely entitled and the heirs of the widow's husband were entitled to recover possession.

Per Dawson Miller, C. J.—It is not possible for a Mahomedan widow to transfer the lien on the property so as to be binding after her life time without transferring also the dower debt because the lien on the property which gives the widow the right to possession until the debt has been discharged, is not an interest in property which can be severed from the right to dower and transferred as a separate interest. A transfer or possession of the property forming the security for the dower debt would not enure to the benefit of the transferee after the widow's death when the dower debt passed to her heirs. The possession of the donee in such a case must be regarded as constructive possession of the widow.

Per Mullick, J.—The right of Muhammadan widow to retain possession of her husband's estate in lieu of dower is strictly speaking neither a lien nor a charge. She has a right to transfer the debt coupled with the security so as to bind her co-heirs until they discharge the debt. She can also during her life time transfer the right of possession apart from the debt but that is a matter between herself and her transferee and the

MAHOMEDAN LAW— Dower— Widow's lien— Transfer of.

transfer will not bind her co-heirs after her death. (*Dawson Miller, C. J. and Mullick, J.*) SHEIKH ABDUR RAHMAN *v.* SHEIKH WALI MOHAMAD.

68 I.C. 601=1922 P.H.C.C. 313=2 Pat. 75= 4 P.L.T. 267=A.I.R. 1923 Pat. 72.

———*Widow in possession for Dower debt—Transfer by widow—Transferee can retain possession until dower debt is satisfied.*

A widow in possession of her husband's properties in lieu of her dower debt has no proprietary title in the property except to the extent of her share therein. She can transfer her security in which case the transferee can retain possession until the dower debt is paid. Where she *sells* such property the sale is utterly ineffectual for conferring any title in the vendee, but he is entitled to remain in possession as long as her claim to dower remain unsatisfied. But the moment her claim is satisfied either by payment to her or her heirs, the heirs of the husband are entitled to recover possession of the property from the transferee and the same result follows where the heirs of the widow happen to be the heirs of the husband also, for in such an event the right to receive the dower debt and the liability to pay it unite in the same persons and there is consequent extinction both of its debt and the security and therefore of the right to retain possession of the property as security for the debt. 43 M. 214; 63 I.C. 344 Ref. (*Coutts and Das, JJ.*) MT. BIBI MAKBALUNNISSA *v.* MT. BIBI UMATUNNISSA.

70 I.C. 312=1922 P.H.C.C. 348= 2 Pat. 84=4 P.L.T. 272=A.I.R. 1923 Pat. 33.

———*Transfer of property—No transfer of dower debt—Effect.*

A Muhammadan widow is entitled to transfer her right in her husband's property of which she is in possession in lieu of dower without transferring also her dower debt. 12 A.L.J. 1141 Dist; (1866), N.W.P. H.C. Rep. 287 and 32 All. 551 Foll. (*Ryves and Gokul Prasad, JJ.*) ABDULLA *v.* SHAMS-UL-HAQ.

43 All. 127=A.I.R. 1921 All. 262.

———*Deed of transfer—Construction.*

The question whether a widow who transfers her husband's estate in her possession also transfers her dower debt is mainly one of the construction of the deed of transfer in each case, where the dower debt is not transferred either expressly or impliedly along with the property, the widow's possessory lien for the dower becomes extinguished and she cannot subsequently transfer it. (Case Law discussed). (*Tudball and Sulaiman, JJ.*) BINDESHRI PERSHAD *v.* AFZUL KHAN.

63 I.C. 344=19 A.L.J. 706= A.I.R. 1921 All. 242.

—Dower—Wife's Lien—When arises.

———*Wife has no lien.*

A wife cannot have during the lifetime of her husband any lien on her husband's property not in her possession, for satisfaction of her dower. (*Mohiuddin and Jackson, A.J. Cs.*) KULSAMBI *v.* BILANKHAN.

117 I.C. 220=A.I.R. 1929 Nag. 121.

———*Wife is not entitled to lien for dower, over her husband's properties during his lifetime.*

Under the Muhammadan Law a wife has no lien for her unpaid dower over her husband's property in her possession during his lifetime, if she has not been divorced from him. (*Abi Dhumusa Bibi* v. *Muhammad Fathi Uddin* (1918) 41 Mad. 1026 referred to. (*Oldfield and Ramesam, JJ.*) P. S. NARAYANA AYYAR *v.* BIYARI BIVI.

68 I C. 673=45 Mad. 103= 14 M.L.W. 524=1921, M.W.N. 808= A.I.R. 1922 Mad. 221=41 M.L.J. 557.

MAHOMEDAN LAW—Gift—Construction. —Family arrangement—

———*Minors' interest fully safeguarded—Adult members accepting arrangement—It is binding also on minors.*

Even in the case of a Mahomedan family if the family arrangement is a fair and equitable one it should not be rejected simply on the ground that the minors were not represented by a properly constituted guardian of theirs at the time when the arrangement was arrived at. If the interests of the minor children are fully safeguarded and if all the adult members of the family accept the arrangement it should be held binding on the minors: 33 All. 256 (P.C.); 3 Agra H.C.R. 82 and A.I.R. 1922 P.C. 356, Appl. (*Misra and Srivastava, JJ.*) AMEER HASAN *v.* MUHAMMAD EJAZ HUSAIN.

117 I.C. 456=6 O.W.N. 51= A.I.R. 1929 Oudh 134.

—Gift—
Construction.
Death Illness.
Delivery of Possession.
Essentials.
Hiba-bil-ewaz.
Law Applicable.
Musha.
Proof of.
Revocation.
Subject of.
Validity of.
Miscellaneous.

—Gift—Construction.

———*Gift made of life-estate with remainder to another—*Wakf *deed giving property to two minor girls from generation to generation with direction that their descendants or husbands would have no claim over it.*

Where a gift is made by a Mahomedan of a life-estate with remainder to another person the donee takes the property absolutely, the further conditions being treated as void.

A *wakf* deed while giving certain property to two minor girls recited that the two girls may enjoy the property from generation to generation according to female descent, that they should not alienate the property in any manner, that if any alienations were made, they would be void and that their male descendants and their descendants and the husbands of the female descendants shall have no reason to claim any manner of right in the property. One of the donees died and her husband and her son filed a suit for a partition.

Held, that the deed was a valid deed of gift which passed to the donee's absolute rights in the properties and that the heirs of the deceased were entitled to a share in it. 24 M.L.J. 258, Foll A.I.R. 1929 P.C. 149 Dist. (*Kumaraswami Sastri, J.*) ALIMAMMA *v.* AMADE BEARI.

31 M.L.W. 765= A.I.R. 1930 Mad. 510=58 M.L.J. 571.

———*Donor making gift of whole property to his wife and empowering her to alienate a part only by mortgage, sale or gift—After death of donee entire property to revert to donor's named collaterals—Gift to wife was of life-interest in entire property with power of alienation with respect to a portion of it.*

A donor by the terms of the deed purported to make a gift without consideration to his wife of the entire property detailed therein. He divided the property into two parts, one-third and two-thirds, with a view to giving his wife a power to alienate the one-third of the property of any part thereof by way

MAHOMEDAN LAW—Gift—Construction.

of mortgage, sale or gift. It was further provided that after the death of the donee "the entire property gifted away by the document should revert to the donor's collaterals named therein subject to any mortgage, sale or gift which the wife had power to make during her lifetime in respect of the one-third part of the property mentioned in the deed.

Held, that the donor intended to make and did make a gift to his wife of a life-interest only in the entire property comprised in the deed together with the above mentioned power of alienation in respect of one-third of the property: 17 W. R. 525, Dist. (*Sir Lancelot Sanderson*,) AMJAD KHAN *v.* ASHRAF KHAN. **116 I.C. 405=6 O.W.N. 483= 33 C.W.N. 753=1929 A.L.J. 571= 31 Bom. L.R. 809=56 I.A. 213= 30 M.L.W. 91=4 Luck. 305= A.I.R. 1929 P.C. 149=57 M.L.J. 439.**

———*Grant for maintenance of illegitimate son is for life.*

Where the purpose of a grant is the maintenance of illegitimate son, the purpose is *prima facie* an indication that the grant was intended to be only for the life of the grantee, and the entry of the grantee's name in the khewats as an owner, several transfers made by him while in possession, the grantor not being under any legal obligation to make provision for his maintenance, neither singly nor collectively rebut that *prima facie* construction. (*Hasan and Misra, JJ.*) MOHAMMAD SIDDIQUE KHAN *v.* RISALDAR KHAN. **95 I.C. 220=2 Luck. 216= 3 O.W.N. 447=A.I.R. 1926 Oudh 360.**

—Gift—Death illness.

———*Marz-ul-maut—Proximate danger of death, subjective apprehension of death and inability to attend to ordinary avocations are essential.*

If a malady has continued for a sufficiently long time and has, in fact, become a part of the physical system of the mariz (patient), so that he has become more or less accustomed to it and has consequently lost all fear of death on its score, it would cease to be marz-ul-maut. The crux in all these cases is to find out the state of the mind of the deceased in order to ascertain whether there was such a preponderance of apprehension of death at the time of the execution of the deed in question that death seemed to him more probable than life. It would be unsafe to introduce into the already highly technical doctrine of marz-ul-maut, considerations regarding the apprehensions of the deceased at periods distinctly and definitely prior or subsequent to the time when the document in dispute was executed and disposition made.

Thus where there is not evidence that the wakf on the day he executed the deed of wakf was under apprehension of death, the mere fact that he was suffering from phthisis or that he died a few days after is not enough to justify the applicability of the doctrine of marz-ul-maut : 3 *C. W. N.* 57; 31 *Cal.* 319; 30 *Bom.* 537; 31 *Bom.* 264; 3 *Pat. L. W.* 232; 35 *Cal.* 1; 35 *Cal.* 271; 40 *All.* 238; *A. I. R.* 1925 *Cal.* 537, *Ref.* (*Tekchand and Agha Haider, JJ.*) RASHIDUDDIN *v.* NAZIRUDDIN. **11 L.L. J. 404= A.I.R. 1929 Lah. 721.**

———*Burden of proof on party alleging marz-ul-maut.*

A Mahomedan suffering from scrofula and phthisis executed a deed of wakf and went to the Sub-Registrar's office to get the wakfnama registered. The wakfnama was challenged as being invalid on the ground that it was executed while the wakf was suffering from marz-ul-maut.

MAHOMEDAN LAW—Gift—Death illness.

Held : that the burden of proving that the deed of wakf was executed by the executant while he was suffering from marz-ul-maut was on the person alleging ti. (*Tekhand and Agha Haider, JJ.*) RASHIDUDDIN *v.* NAZIRUDDIN. **11 L.L.J. 404=A.I.R. 1929 Lah. 721.**

———*Gift from husband to wife in lieu of dower is not a bequest and is not subject to doctrine of marz-ul-maut.*

A gift by a husband to his wife during marz-ul-maut, in satisfaction of his obligation to pay the dower debt cannot be treated as testamentary for the simple reason that, had not the husband discharged his legal obligation, his estate in the hands of his heirs would have been liable to satisfy the same obligation. Such a gift being for consideration, is irrevocable and cannot be treated as bequest and, therefore, it is not subject to the doctrine of marz-ul-maut. (*Wazir Hasan and Pullan, JJ.*) SADIQ ALI *v.* MT. AMIRAN. **121 I.C. 87=6 O.W.N. 768=A.I.R. 1929 Oudh 439.**

———*Validity—Extent.*

A gift made in mortal sickness cannot operate on more than one-third of the donor's assets. (*Dawson Miller, C. J., and Adami, J.*) ALI ZAMIN *v.* MD. AKBAR ALI KHAN. **116 I.C. 525=7 Pat. 426= 9 P.L.T. 699=A.I.R. 1928 Pat. 441.**

———*Marz-ul-maut—Essentials discussed.*

That illness alone which in the ordinary course is fatal and from which the person suffering eventually dies and which is accompanied by an actual apprehension of death in the sufferer's mind or by circumstances likely to create in him the apprehension of death comes within the definition of a marz-ul-maut. The essential condition of a marz-ul-maut is the apprehension or fear of death in the sufferer's mind. To enable one to decide whether such apprehension existed or was likely to have existed certain tests have been prescribed by the Mahomedan lawyers which, however, are not conclusive either with respect to the illness or the apprehension. When a person has suffered from an illness, which is ordinarily mortal for a long time, so that it has become, as it were, a part of his constitution and thus ceased to cause apprehension of death, the illness is not a marz-ul-maut. The time which may be considered long enough to negative the existence of the apprehension is a year or more. But a long continued illness may become a marz-ul-maut when it begins to increase in severity and the increase ends with death for the aggravation is to be taken as a new illness likely to create fear of death in the sufferer's mind. Inability to attend to one's daily avocations or to stand up to say one's prayers may be regarded as a test of marz-ul-maut, for such inability in a person suffering from a mortal disease may ordinarily be taken as sufficient to create an apprehension of death: 3 C. W. N 57 ; 31 Cal. 319 and 35 Cal. 271, (P. C.) Foll. (*Kotwal A. J. C.*) UMRAO *v.* KARIM. **103 I. C. 30=23 N. L. R. 102= A. I. R. 1927 Nag. 324.**

———*Death-bed gift—Donor paralytic and dying eight months after attack—Doctrine applies.*

Where the donor at the time of wakfnama was a very old man ; was attacked by paralysis of the lower limbs ; he at once became a helpless invalid, permanently confined to his bed ; he could not perform the ordinary offices of nature without assistance, and even he could not leave his bed for religious exercises and diet till eight months after.

Held : that the deed was executed when there was apprehension of imminent death and the wakf was valid only to the extent of one-third of the wakf's assets : (Case law and authorities discussed in detail.)

MAHOMEDAN LAW—Gift—Death-illness.

———*Onus of proof.*

The burden of proof of a deed of gift executed during death-illness rests on the party assailing the deed. (*Shah, Ag. C. J. and Kincaid, J.*) HASSANALLI DEGUMIYA *v.* RUHULLA HAMAD. **86 I. C. 886 = 27 Bom. L. R. 184 = A.I.R. 1925 Bom. 305.**

———*Essential conditions.*

In order to establish marz-ul-maut there must be present at least three conditions :—(*a*) Proximate danger of death, so that there is a preponderance of apprehension, that is, at the given time death must be more probable than life; (*b*) there must be some degree of subjective apprehension of death in the mind of the sick person ; (*c*) there must be some external *iadicia*, chief among which may be placed the inability to attend to ordinary avocations. (*Shah, Ag. C.J. and Kincaid, J.*) HASSANALLI DEGUMIYA *v.* RUHULLA HAMAD. **86 I.C. 886 = 27 Bom. L.R. 184 = A.I.R. 1925 Bom. 305.**

———*Marz-ul-maut—Apprehension of immediate death is necessary—Occurrence of death few days after is not enough.*

The mere fact that the donor was suffering from phthisis or that he died a few days after the execution of the deed is not enough to establish what in Muhammadan Law is technically called Marz-ul-maut. On the contrary lingering diseases like phthisis have been taken by Muhammadan lawyers to remove the suspicion of apprehension of immediate death on the mind of the patient. 35 C. 271 (P.C.), Ref. (*Suhrawardy J.*) SYED RAZA ALI *v.* KAZI NUR-UD-DIN AHMAD. **78 I, C. 174 = A.I.R. 1925 Cal. 537.**

———Carbuncle in case of person of eighty is death-illness. (*Stuart, J.*) MT. FAIZ BIBI *v.* RUDRAT ULLAH. **78 I.C. 977 = A.I.R. 1924 All. 935.**

———*Gift by pregnant woman—Gift will be* marz-ul-maut *only if made after pains begin.*

It is not the Muhammadan Law that a woman who is pregnant is considered to be suffering from a mortal disease and on the face of it it would be an absurdity to support such a doctrine. The Muhammadan Law takes the common sense view that the danger does not begin until the pains begin. (*Stuart, J.*) SYED SHUMSUL HASAN *v.* SYED HASAN. **71 I.C. 296 = A.I.R. 1923 All. 173.**

———*Conditions.*

In order to establish *Marz-ul-maut* there must be present at least three conditions :—

(1) Proximate danger of death, so that there is a preponderance of apprehension or *Khouf* that at a given time death must be more probable than life ;

(2) there must be some degree of subjective apprehension of death in the mind of the sick person ; and

(3) there must be some external *indicia*, chief among which would be the inability to attend to ordinary avocations. 30 Bom. 537 ; 31 Bom. 264 and 31 Cal. 319, Foll.

Too narrow a view must not be taken of the doctrine of death-illness. The question is was the disease of such a nature or character as to induce in the person suffering, the belief that death would be caused thereby or to engender an apprehension of death and was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers, a circumstance which might create in the mind of the sufferer an apprehension of death. 3 C.W.N. 57, Foll. (*Kincaid, J. C. and Raymond, A.J.C.*) MT. BHAGHARI *v.* MT. KHATUMAL. **80 I.C. 118 = 16 S.L.R. 25 = A.I.R. 1921 Sind 177.**

MAHOMEDAN LAW—Gift—Delivery of possession—Constructive possession.

—Gift—Delivery of Possession—Common residence.

Under Mahomedan Law the gift of a portion of the family house in which the donor and donee have all along been living is valid even though there is no actual divesting by donor or delivery to the donees. 13 Mad. 46, Foll. (*Wallace, J.*) MUHAMMAD NAINA MARACAIR *v.* UMMANAIKANI AMMAL. **A.I.R. 1930 Mad. 593.**

———Actual transfer of physical possession is not necessary to complete a gift in cases where donor and donee live in the gifted house. The fact that the donor continued to live in the same house for about a month after the date of the gift which he had made by means of a registered deed does not show that possession was not given to the donee where it is so expressly stated in the deed. (*Case-law discussed.*) (*Jai Lal, J.*) RAHMAT ALI *v.* MT. DAULAT BIBI. **90 I.C. 640 = 7 L.L.J. 301 = 26 P.L.R. 322 = A.I.R. 1925 Lah. 501.**

—Gift—Delivery of possession — Constructive possession.

———*Gift is validated by even constructive possession when actual possession is not possible.*

The need of seisin in a case of gift on the part of the donee is satisfied according to the nature of the possession of which the gifted property is capable. Such seisin may be either actual or constructive. Where, therefore, the subject-matter of the gift is only capable of constructive possession and such possession accompanies the gift, the gift must be held to be valid. 15 Cal. 684 (P.C.); 11 Cal. 121 (P.C.) ; A.I.R. 1922 P.C. 281; A.I.R. 1929 P.C. 149; 28 All. 439 (P.C.) and 11 All. 460 (P.C.), Rel. on. (*Wazir Hasan and Srivastava, JJ.*) ZAHURAN *v.* ABDUS SALAM. **123 I.C. 857 = 7 O.W.N. 88 = A.I.R. 1930 Oudh 71.**

———*Sufficiency.*

No doubt, under the Muhammadan Law delivery of possession is necessary in order to make a gift valid. But the intention of the donor is to be looked to.

By possession in connexion with the law of gift is meant such possession as the nature of the subject of the gift is capable of and each case will depend on its own facts. The mere fact that the donor happened to live in the house which was the subject of the gift would not be sufficient to make the possession of the house that of the donor.

The land in the possession of the tenants could be the subject of a valid gift and all that is required by the donor in order to perfect the gift is to give such possession as the property is capable of. If the property is in the possession of tenants and if the donee is unable to receive the rents and profits of the property even then the gift would be good ; and in the case of a mortgage with possession when the term expires or when the time for redemption accrues, if the property is redeemed by the donee, that would be sufficient in order to validate the gift under the Muhammadan Law. 11 All. 460 (P.C.), Foll.

Where a person makes gift of certain items some of which he cannot at once deliver into the hands of the donee, it would not be right to hold that the whole gift is invalid or that portion of gift relating to the property which could not be delivered into the hands of the donee is invalid. It would be against the clear intention of the donor to declare that a portion of the gift is invalid when he intended that the whole of it should be valid. (*Devadoss, J.*) AJAGAR HAZAR SAHEB *v.* ANNAMMAH. **100 I.C. 62 = A.I.R. 1927 Mad. 572.**

———*Donor putting donee in a position to take possession is sufficient delivery for validating gift.*

MAHOMEDAN LAW—Gift—Delivery of possession—Constructive possession.

When the donor puts the donee in a position to take possession of all the properties in gift, it is sufficient delivery under the Mahomedan Law to validate the gift, and therefore where the properties gifted are in possession of tenants and the donor informs them of the gift and asks them to attorn to the donee, the gift is valid. (*Adami and Kulwant Sahay, JJ.*) ABDUL HAQUE *v.* MT. TAMIZAN. **97 I.C. 154=8 P.L.T. 406=A.I.R. 1927 Pat. 20.**

——*Declaration of intention, transfer in Government Register and asking tenants to attorn to donee are enough.*

Where the donor declared his intention to part with the possession of the gifted property and his intention was manifested by actual transfer of the property in the name of the donee in the Municipal and Government Land Record and he asked his tenants to attorn to the donee,

Held, that there was proper transfer of possession to validate a deed of gift. (*Shah, Ag. C. J. and Kincaid, J.*) HASSANALLI DEGUMIYA *v.* RUHULLA HAMAD. **86 I.C. 886=27 Bom. L.R. 184=A.I.R. 1925 Bom. 305.**

—Gift—Delivery of possession—Fiduciary relation.

Where the donee is a minor who cannot take possession of the property gifted, the intention to give declared in the deed is sufficient provided the donee and guardian continue to hold the property on behalf of the donee. 13 Mad. 46, Foll. (*Wallace, J.*) MUHAMMAD NAINA MARACAIR *v.* UMMANAIKANI AMMAL. **A.I.R. 1930 Mad. 593.**

——Ordinarily, a gift of immovable property, of which the donor is in actual possession, is not complete unless he physically departs from the premises with all his goods and chattels and the donee formally enters into possession. But where the donee is a minor and the donor is either the guardian of the donee or stands in *loco parentis* to him, no change of possession is necessary to complete the gift. In such a case a mere declaration by the donor is considered sufficient, provided it can be inferred from the surrounding circumstances that the donor had a real and *bona fide* intention to make the gift.

If the donor is in actual possession of the gifted property, the law will be satisfied without change of possession and will presume the subsequent holding of the property to be on behalf of the minor. But this rule does not apply where the donor is not in actual possession. The gift by a father to his infant-child is completed by the contract, and it makes no difference whether the subject of the gift be in his own hands, or in deposit with another. But if it be in the hands of an usurpur or of a pledgee or of a tenant who has hired it, the gift is not lawful for want of possession. 23 W. R. 208 (P. C.); 15 M. L. T. 345; 35 M. L. J. 541; and 29 M. L. J. 733; Foll. (*Harrison and Tek Chand, JJ.*) ALLAH RAKHA *v.* ALI MAHOMED. **108 I. C. 741=9 Lah. 567=30 P. L. R. 107=A. I. R. 1929 Lah. 45.**

——*Grandfather making gift of property to daughter's sons—Parents of grandsons as well as the grandsons living with grandfather—Donor keeping possession of the property with himself—Gift is not complete.*

In a case of alleged gift by maternal grandfather to his grandsons, it was found that the grandsons were minors at the time of the alleged gift, the parents of the minors lived in the house of the donor as well as the grandsons themselves and they were maintained by the donor if not entirely at any rate to a large extent. The donor had announced to his friends at a dinner party that he had made a gift of his property to his grandsons. There was no mutation of names and no deed was executed. The grandfather continued to be in possession of the property and there was no evidence to show that the donor in any way intimated that he regarded himself as a trustee for his grandsons or that he was in possession of the property on their behalf.

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Held, that the case did not come within the exception to the general rule and therefore the gift was not complete in the absence of any delivery of possession or relinquishment of control over the property by the grandfather. (*Sir Lancelot Sanderson.*) MUSA MIA *v*, KADAR BAX. **109 I. C. 31=52 Bom. 316=55 I. A. 171=32 C. W. N. 733=47 C. L. J. 517=30 Bom. L. R. 766=A. I. R. 1928 P. C. 108=54 M. L. J. 655 (P.C.).**

——*Gift to wife—Mutation of wife's name effected—Possession of husband will be presumed to be on behalf of wife.*

In the case of a gift of immovable property by a Mahomedan husband to his wife, once mutation of names has been proved, the natural presumption arising from the relation of husband and wife existing between them is that the husband's subsequent acts with reference to the property were done on his wife's behalf and not on his own, 1 Bom. H. C. 157 and 13 Bom. 352, Rel. on. (*Sir John Wallis.*) MA MI *v.* KALLANDER AMMAL. **100 I.C. 32=5 Rang. 7=54 I. A. 23=25 A. L. J. 69=29 Bom. L. R. 772=45 C. L. J. 268=31 C.W.N. 625=A. I. R. 1927 P. C. 22=52 M. L. J. 362. (P.C.)**

——*Gift to minor in custody of donor—Transfer of possession is not necessary—"Lawful custody" meaning explained.*

No transfer of possession is necessary in the case of a gift where a donee is a minor in lawful custody of the donor and the words "lawful custody" are not limited to the custody of only such persons as those who come first in the line of succession of those entitled to claim guardianship, but include the custody of a person in actual custody of the minor with the express consent of the legal guardian or at any rate with a consent to be implied from the absence of any opposition. (*Boys and Kendall, JJ.*) MAHOMED YUSUF *v.* MAHOMED ISMAIL. **100 I. C. 1022=A. I. R. 1927 All. 414.**

——*Gift by husband to wife.*

In the case of gifts among Mahomedans, delivery of possession is necessary for validity: 49 I. A. 195 and A. I. R. 1922 P. C. 281 (P. C.), Foll. And even in the case of a gift from the husband to the wife, an overt act to evidence delivery is not less necessary, on the grounds both of Mahomedan and of general jurisprudence.

The onus is on the donee to prove that possession was given. 3 I. A. 291 and 2 Cal. 184 (P. C.), Foll.

Where husband and wife are living together and where, therefore, it may be said that the wife is already in part possession of the property, a less unequivocal act is required as exemplifying the intention of the parties than would be requisite in a case where the parties were not living together or were strangers.

Where a deed of gift of a house made by a Mahomedan husband in favour of his wife provided in the end "And my right to live in that property till life has been reserved. And you are to take possession of the said property after my death" and there was no

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evidence to show that actual or constructive possession of the property was given to the donee.

Held: there was no delivery of possession and hence the deed of gift was null and void. (*Case-law discussed.*) (*Marten and Madgavkar, JJ.*) KADARBHAI *v.* NANIBIBI. **98 I. C. 285= 28 Bom. L. R. 1098=A. I. R. 1926 Bom. 559.**

——*Gift in trust.*

In order to complete a gift by way of trust it is sufficient to give possession to the trustee, but a Mahomedan trustee can, in such a case by making himself a trustee or agent of the donee of expressing an intention to treat his own possession as the donee's, unequivocally, transfer legally effectual possession to the donee while himself remaining in actual possession. 2 L. W. 1018, Foll. (*Srinivasa Aiyangar, J.*) MD. BI BI *v.* SULAIMAN. **98 I. C. 838= 24 M. L. W 425=A. I. R. 1926 Mad. 1110.**

——*Gift by husband to wife.*

Per *Ashworth, A. J. C.*—For a gift by a husband to a wife who is not a minor, some act of delivery of possession other than the mere declaration in the deed that possession has been given is necessary.

Per *Wazir Hasan, A. J. C.*—Where the object of the gift is to accelerate the operation of a previous will, the donor stands in the relation of husband to the donee, the donee is a *pardanashin* lady, the subject-matter of the gift in her favour is an interest in the property and not the *corpus* of it, the husband and the wife live amicably together so long as the former is alive, and in the deed of gift the donor makes a declaration to the effect that he has put the lady donee in possession of the property, the lady should be held to acquire such possession as the nature of the property gifted to her is capable of and the gift should be held to be completed. (*Wazir Hasan and Ashworth, A. J. Cs.*) AMJAD KHAN *v.* ASHRAF KHAN. **87 I. C. 445=2 O. W. N. 83=28 O. C. 265= A. I. R. 1925 Oudh 568.**

——*Gift to minors under guardianship of donor—Unequivocal declaration of donor's being divested is sufficient.*

Where a gift is made in favour of minor children under the guardianship of the donor, delivery of possession is not absolutely essential, an unequivocal declaration that the donor has ceased to hold the property as owner is sufficient. (*Daniels and Dalal, A.J. Cs.*) MST. HAIFIZ-UN-NISSA *v.* JAWAHIR SINGH. **66 I.C. 24=24 O.C. 374=A.I.R. 1921 Oudh 209.**

—Gift—Delivery of possession—Part delivery.

——*Presumption.*

Where there is evidence to show that some of the properties in a gift have been delivered, delivery of possession of all properties can be inferred. (*Adami and Kulwant Sahay, JJ.*) ABDUL HAQUE *v.* MT. TAMIZAN. **97 I.C. 154=8 P.L.T. 406= A.I.R. 1927 Pat. 20.**

——*Possession given of some lands but not of others—Gift operates as to latter also.*

A gift should be looked at as a whole. Where the donor of certain properties gives the donee actual possession of such of them as are in the donor's possession but with regard to the rest which have been mortgaged to a third person with possession, nothing further is done than the mere execution of the gift deed, the donee should be held entitled to the latter set of properties also and to redeem the mortgage on them. (*Macleod, C.J. and Shah, J.*) CHANDSAHEB KASHIMSAHEB *v.* GANGABAI VISHNU. **64 I.C. 21=45 Bom. 1296=23 Bom. L.R. 563= A.I.R. 1921 Bom. 248.**

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Donor not in possession but doing all in his power to complete the gift—Gift is valid. 15 Cal. 684, Foll.; 30 All. 250 and 11 All. 460 (P.C.), Rel. on. (*Dalal and Pullan, JJ.*) MT. AHMADI BEGAM *v.* ABDUL AZIZ. **100 I.C. 644=49 All. 503=25 A.L.J. 407= A.I.R. 1927 All. 345.**

——*Admissions as to delivery of possession by donor has not the effect of actual delivery.*

Admissions as to delivery of possession by donor, firstly in the deed of gift itself, secondly, before the Sub-Registrar, thirdly, in the mutation proceedings, and fourthly, in the jawab-i-dawa filed by him in a subsequent suit between the co-sharers of the holding, cannot have the effect of putting the donees in actual possession of the undivided share. (*Zafar Ali, J.*) AHMAD HUSSAIN *v.* QUMAR ULZAMAN. **102 I.C. 829=9 L.L.J. 220=A.I.R. 1927 Lah. 413.**

—Gift—Essentials.

In order to constitute a valid gift *inter vivos* under the Mahomedan Law applicable to Hanafis, three conditions are necessary, *viz.*, (1) Manifestation of the wish to give on the part of the donor. (2) The acceptance of the donee, either impliedly or expressly. (3) The taking possession of the subject-matter of the gift by the donee, either actually or constructively. A.I.R. 1922 P.C. 281, Rel. on. (*Sir Lancelot Sanderson.*) AMJAD KHAN *v.* ASHRAF KHAN. **116 I.C. 405=6 O.W.N. 483=33 C.W.N. 753= 1929 A.L.J. 571=31 Bom. L.R. 809= 56 I.A. 213=30 M.L.W. 91=4 Luck 305= A.I.R. 1929 P.C. 149=57 M.L.J. 439. (P.C.)**

——Under Mahomedan Law it is essential to the validity of a gift that there should be (*i*) a declaration of gift by the donor; (*ii*) an acceptance of the gift by the donee, express or implied; and (*iii*) it should be accompanied by such delivery of possession as the gifted property is susceptible of. (*Harrison and Tek Chand, JJ.*) ALLAH RAKHA *v.* ALI MAHOMED. **108 I.C. 741=9 Lah. 567=30 P.L.R. 107= A.I.R. 1929 Lah. 45.**

——Registration of deed does not cure the want of delivery of possession. (*Harrison and Tek Chand, JJ.*) ALLAH RAKHA *v.* ALI MAHOMED. **108 I. C. 741= 9 Lah. 567=30 P. L. R. 107= A. I. R. 1929 Lah. 45.**

——*Registration is not necessary to complete gift.*

When the ingredients necessary for the completion of a valid gift under Mahomedan Law are proved to have been present, the gift is complete and registration is not necessary to complete the gift and is a superfluous act. (*Srivastava, J.*) ABDUL RAHMAN *v.* GAYA PRASAD. **6 O. W. N. 843= A. I. R. 1929 Oudh 435.**

——If a person disposed of by gift a house to another and continued himself to inhabit it, or even keep some part of his property therein, the gift is void if complete delivery and possession are not established. Exception is made in that case to the gift of a house by a wife to her husband in which the parties continue, both, to reside and by a father of his house to his son while himself continuing to occupy it (6 M. H. C.R. 455, Ref.) In other cases for the completion of the gift, abandonment even for a short time by the donor would be necessary (29 Bom. 478, Ref.) Or it is sufficient that the donor and the donee are present on the premises, and an intention on the part of donor to transfer has been unequivocally manifested. (9 Bom. 146, Ref.) Where beyond the written deed of gift, there is no unequivocal intention to transfer manifested, but on the contrary the donor, soon after her deed of gift, joined in mortgaging the house,

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Held, this action of her would tend to show that there was no such intention expressed as would render unnecessary the vacation of the house by her to complete the gift. (*Adami, J.*) DALPHEROO MIAN *v.* BANGALI MALI. **71 I.C. 897=4 P.L.T. 397= A.I.R. 1923 Pat. 481.**

——*Oral gift.*

An oral gift by a Mahomedan may be a valid one, but the mere fact that the wife wanted mutation of her property in her husband's name is not sufficient proof of deliberate surrender or transfer by the wife in her husband's favour. In such a case the question of adverse possession between husband and wife does not arise. 24 W. R. 274; 11 N.L.R. 164; 3 All. 266 and 30 Mad. 305, Ref. (*Findlay, J.C.*) MAYADAD KHAN *v.* HAZARILAL. **108 I.C. 435= A.I.R. 1928 Nag. 275.**

——*Possession must pass to the donee.*

For the validity of a gift under Mahomedan Law, possession of the gifted property must pass from the donor to the donee. A.I.R. 1927 P.C. 22, Rel. on. (*Wazir Hasan and Nanavutty, JJ.*) MAHOMED HAIDAR *v.* MOTI LAL. **110 I.C. 26= A.I.R. 1928 Oudh 414.**

——It is the essence of a gift under Mohamedan law (1) that the donor should intend to transfer in present to the donee the subject-matter of the gift; (2) that there should be acceptance of the gift by the donee; or (3) that the donee should have obtained delivery of seisin. Acceptance and seisin may be actual or constructive according to the circumstances of the case, but no transaction, of which the above are not ingredients, is or is to be treated as a gift under Mohamedan law. (*B. B. Ghose and Page, JJ.*) SARAFUDDIN MOHAMED *v.* MOHIDDIN MUHAMMAD. **105 I.C. 67=54 Cal. 754=31 C.W.N. 1068= A.I.R. 1927 Cal. 808.**

——*Essentials are declaration, acceptance and delivery of possession.*

The essentials of a gift under the Mahomedan Law are a declaration of heba by the donor, an acceptance, express or implied, of the gift by the donee, and delivery of possession of the property, the subject-matter of the gift, according to its nature. A simple gift can only be made by going through the above formalities and no written instrument is required. 38 All. 627 (P.C.), Rel. on.

The position under the Mahomedan Law is this that a gift, in order to be valid, must be made in accordance with the forms stated above; and even if it is evidenced by writing, unless all the essential forms are observed, it is not valid according to law. This being so, a deed of gift executed by a Mahomedan is not the instrument effecting, creating or making the gift, but a mere piece of evidence and does not require registration within the meaning of S. 17, Registration Act. (*Suhrawardy and Graham, JJ.*) NASIB ALI *v.* WAJED ALI. **100 I.C. 296= 44 C.L.J. 490=A.I.R. 1927 Cal. 197.**

——*Gift by father to son is complete on execution of deed—Registration or delivery of possession is not necessary.*

Under Muhammadan Law, a deed of gift executed by father to his minor son is complete and binding as soon as the donor executes the deed, and neither registration nor delivery of possession is necessary to make it complete. 19 Mad. 433; 35 All. 3 and 40 Mad. 204, Considered. (*Campbell, J.*) FATEH MAHOMED *v.* MITHA. **92 I.C. 479= A.I.R. 1926 Lah. 286.**

——*Gift and* hiba-bil-iwaz—*Possession is unnecessary in* hiba-bil-iwaz *unlike in gift.*

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A *Hiba-bil-iwaz* has incidents very different from those of a simple gift inasmuch as the taking of possession is necessary to validate a gift, pure and simple, whereas in the case of a *hiba-bil-iwaz* the taking of possession is not necessary. (*Scott-Smith and Fforde, JJ.*) HAFIZ FEROZ-UD-DIN AHMAD *v.* SARDAR SHAH. **79 I.C. 81=6 L.L.J. 221= A.I.R. 1924 Lah. 562.**

——*Declaration, acceptance and transfer are essential though registration is not necessary.*

Under Muhammadan Law a gift can be made orally and need not be made by a registered instrument but there must be evidence from which a declaration by the donor, acceptance by the donee and transfer of possession may be proved. The fact that father allowed his two sons to be recorded as owners of the property is no sufficient proof of a declaration of gift. A man might allow his property to be recorded and possessed by his sons without any intention that they should be owners as for instance if he wishes to baffle his creditors. The Muhammadan Law while dispensing with a registered deed does require a formal declaration. (*Ashworth, J.C.*) KHALIL ULLAH SHAH *v.* EWAY ALI. **74 I.C. 390= 26 O.C. 128=A.I.R. 1923 Oudh 214.**

——Hiba-bil-iwaz—*Passing of consideration and* bona fide *intention of donor to divest himself* in presenti *of property, are essential elements.*

Where a gift is made in consideration of the donee giving up certain rights, but it is not proved that the donee did so. *Held*: the gift is not valid and the property does not pass to the donee. In a *Hiba-bil-iwaz* actual payment of the consideration must be proved and the *bona fide* intention of the donor to divest himself *in presenti* of the property to confer it upon the donee must be proved. (*Piggott and Walsh, JJ.*) MOHAN LAL *v.* MAHMUD HUSSAIN. **67 I.C. 671=44 All. 580=20 A.L.J. 434= A.I.R. 1922 All. 347.**

——The essentials of a valid gift, according to Mohammadan law are *aqd* (tender and acceptance or declaration and assent) and *milk* (seisin). By possession in connection with the law of gift, is meant such possession as the nature of the subject of the gift is capable of. (*Chatterjee and Suhrawardy, JJ.*) TARA PRASANNA SEN *v.* SHANDI BIBI. **62 I.C. 481= 49 Cal. 68=25 C.W.N. 761=A.I.R. 1922 Cal. 422.**

——Heba *or* Heba-bil-iwaz—*Document failing as* Heba-bil-iwaz *can take effect as a simple* Heba.

A document which fails as a *heba-bil-iwaz* can take effect as a simple *heba* if it satisfies the conditions of a deed of gift. Where in the plaint a deed of gift is referred to as gift for consideration (*heba-bil-iwaz*) in one part and in another as a simple gift (*heba*) and the question, whether the transaction could be treated as a simple gift, even if the document is not valid as a *heba-bil-iwaz*, is raised in the Court of first instance at the hearing, the Court will consider whether it can be treated as a simple gift having regard to the intention of the donor. 24 C. W. N. 926, Dist. (*Chatterjee and Panton, JJ.*) SERAJUDDIN HALDAR *v.* ISAB HALDAR. **70 I.C. 203=49 Cal. 161= 25 C.W.N. 833=A.I.R. 1922 Cal. 258.**

——*Shiah law—Creation of life-estate and gift over to unborn persons is not valid.*

Under the Shia Law the creation of a life estate and a gift which would amount to a vested remainder in English Law are clearly permissible. But a gift as understood in Shiah Muhammadan Law is a contract between two parties. The elements of proposal and acceptance are the essential constituents of a contract of gift, so that if either of them be wanting there can

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be no valid contract. Seisin is not an essential element of gift, that is to say, of the formation of a contract, but it is necessary for the purpose of giving effect to a contract. The absence of acceptance and the presence of contingency or futurity must be found in a case where a gift is made in favour of a person who has not come into existence. And therefore a gift to such a person must fail. (*Wazir Hasan, A.J.C.*) SIRIJ HUSAIN *v.* MUSHAF HUSAIN. **65 I.C. 132= 9 O.L.J. 149=24 O.C. 321= A.I.R. 1922 Oudh 93.**

—Gift—Hiba-bil-iwaz.

———*Hib-ab-ashart-ul-ewaz—Registration is necessary on fulfilment of condition.*

Although under Mahomedan law the transaction known as hib-ab-ashart-ul-ewaz is nominally a gift with a condition for consideration, yet once the condition is fulfilled the contract becomes a sale and requires registration like sale deed. 4 I.C. 466, Ref. (*Ross and Wort, JJ.*) KHODAIJATUL KUBRA *v.* KRISHNA PERSHAD. **A.I.R. 1930 Pat. 530.**

———Though in the case of a hiba-bil-iwaz it is not necessary to take possession of the property, still it will not be effective unless it is accepted by the donee, or, if he is a minor, by the guardian on his behalf. (*Stuart, C. J. and Raza, J.*) MIRZA MD. SADIQ ALI KHAN *v.* FAKHIR JAHAN BEGAM. **117 I.C. 385= 6 O.W.N. 1251=3 Luck. 521=A.I.R. 1929 Oudh 97.**

———*Heba—Incidents discussed.*

The fundamental conception of a heba-bil-ewaz is that it is a transaction made of two separate acts of donation, that is, it is a transaction made up of mutual or reciprocal gifts between two persons, each of whom is alternately the donor of one gift and the donee of the other. The ewaz or exchange in gift is of two kinds, one subsequent to the contract, the other stipulated for in it. When the exchanging takes place subsequent to the gift, the ewaz is a gift *ab initio*. So that it is valid where gift is valid and void where gift is void, there being no difference between them except as to the dropping of the power of revocation in the case of the ewaz while it is established in that of the gift. And after possession has been taken of the ewaz, the power to revoke drops also with respect to the gift. So that neither party can reclaim from his fellow what he has become possessed of whether the ewaz were given by the donee or by a stranger, with or without his direction. All the conditions of gift are applicable to the ewaz. If a person gives something to another on condition of that other giving something to him in exchange for it, the mutual seisin of the respective returns is regarded; that is to say, the contract is nothing until the two seisins take place, and is made null, by the subject of it on either side being mixed with other property. Giving an ewaz or exchange for the gift may be entirely an afterthought or may have been stipulated for in the first transaction, which in that case is termed hib-ab-ashart-ul-ewaz or a gift with a condition for an ewaz or exchange. In both cases the ewaz is itself a gift, and is valid ouly when it is something that can lawfully be made the subject of gift. Up to possession too, the ewaz may be revoked, but after that, neither the original gift nor the ewaz or exchange for it is resumable.

To every heba the doctrine of musha applies, except in so far as it must be taken that the creators of the doctrine could not have contemplated that it should be applied to the subject-matter of any particular gift. To the true hiba-bil-iwaz the doctrine of seisin and musha apply alike to the original gift and the gift in return, but neither seisin nor musha apply

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to the hiba-bil-iwaz falsely so called in India because such a transaction is not a heba at all, and nothing more or less than a sale. The transaction, falsely termed in India hiba-bil-iwaz, is not governed by the Mahomedan law of heba, but is amenable to the general law in India relating to contracts and the transfer of property. 11 M.I.A. 517 (P.C.), Dist. (*Case-law discussed.*) (*B. B. Ghose and Page, JJ.*) SARIFUDDIN MAHOMED *v.* MOHIUDDIN MAHOMED. **105 I.C. 67= 54 Cal. 754=31 C.W.N. 1068= A.I.R. 1927 Cal. 808.**

Where consideration for transfer is release from dower debt, transaction is not sale, but a gift for consideration—called *heba-bil-iwaz.* 2 Cal. 184 (P. C.) and 9 O.C. 196 (P. C.), Foll. (*Stuart, C. J. and Wazir Hasan, J.*). TALIB ALI *v.* KANIZ FATIMA BEGAM. **102 I.C. 142=4 O.W.N. 400= 2 Luck. 575=A.I.R. 1927 Oudh 204.**

———*Transfer of Property Act, S.* 128—*Applicability to* hiba-bil-iwaz.

A deed by a Mahomedan husband in favour of his wife transferring absolute proprietary title in the immovable property in part payment of her deferred dower is one of *hiba-bil-ewaz* and not a gift and S. 128 does not apply. (*Stuart, C. J. and Raza, J.*) RAM CHARAN *v.* MT. ABIDA BEGAM. **101 I.C. 690= 4 O.W.N. 456=A.I.R. 1927 Oudh 176.**

———*Services rendered by donee to donor having no monetary value—Gift is not in the nature of sale and delivery of possession is necessary.*

Where a gift is made by a Muhammadan in lieu of something which has a monetary value the transaction may be considered by way of sale, and in such a case services of a professional character rendered by the donee to the donor may be considered as a consideration of monetary value. But where there is no money consideration nor can the services rendered by the donee to the donor be reckoned as having a monetary value, the deed cannot be considered to bear the character of sale, but the deed must be interpreted as a deed of gift and delivery of possession is necessary to validate the gift. (*Misra, J.*) AMIR KHAN *v.* HUKUMAT BIBI. **94 I.C. 392= A.I.R. 1926 Oudh 474.**

———*Gift in consideration of love, services or favours rendered is not* hiba-bil-ewaz.

Per *Dalal, J. C.*—The gift which is made in consideration only of natural love and affection or of services or of favours rendered does not fall under the category of *hiba-bil-iwaz* (Wazir Hasan, A. J. C. dissenting.)

Wazir Hasan, A. J. C.—Even an obligation created by past services is an obligation which carries money value and gift made in consideration of such past services must be considered to be *hiba-bil-iwaz.* The narrow sense in which the Mahomedan jurists understood the term "property" is wholly unsuited to the modern and progressive state of society. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) IMDAD ALI *v.* AHMAD ALI. **85 I.C. 400= 28 O.C. 55=A.I.R. 1925 Oudh 518.**

———*Revocability.*

Wazir Hasan, A. J. C.—Where a gift is made in consideration of the services that had been rendered to the donor by the donee the gift is irrevocable. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) IMDAD ALI *v.* AHMAD ALI. **85 I.C. 400=28 O.C. 55= A.I.R. 1925 Oudh 518.**

Oral transfer by a Mahomedan to his wife of

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immovable property of more than Rs. 100 in value in lieu of dower debt must be taken to be sale and not a *hiba-bil-iwaz* and can only be effected by a registered instrument as required by Section 54. 17 C. L. J. 173 and 3 All. 266, Dist. (*Kotval, A. J. C.*) FAHMIDUN-NISA *v.* HIRALAL. **64 I.C. 126= 17 N.L.R. 103=A.I.R. 1921 Nag. 84.**

—Gift—Law applicable.

——*Gift by Mahomedan to Hindu.*

A, a Mahomedan, made a gift of his property to *B*, a Hindu, and completed the transaction by making delivery of possession to him. *A* subsequently sold the property to *C*, another Mahomedan, who afterwards made a gift of that property to his daughter but left the transaction incomplete as no delivery of possession was given. In a suit brought by *C's* daughter in conjunction with *C* against *A* and *B* to whom *A* had gifted away his property, the plaintiffs contended that the rules of Mahomedan law were not applicable to the gift made to *B* and that the provisions of S. 123, T. P. Act, applied to such a gift.

Held: that since under the rules of Mahomedan Law a person governed by that law may make a valid gift to a Hindu by an oral transaction which is perfected by delivery of possession, to apply the provisions of S. 123 to render invalid a gift made in this manner would have the effect of making the section abrogate a rule of Mahomedan law, in spite of the express provisions of S. 129 and that the gift by *A* to the Hindu donee should be treated as valid. Plaintiff's claim was accordingly dismissed as the title of *C's* vendor *A* had ceased before *C* purchased the property from him. 21 Cal. 121 (P.C.), 6 M. H.C. R. 455, Dist. (*Wort and James, JJ.*) MT. TABERA *v.* AJODHYA. **A.I.R. 1929 Pat. 419.**

——*Gift to non-Muhammadan—Incidents of Muhammadan gift apply—After gift is complete, donee's personal law will govern devolution of gifted property.*

After the gift takes effect and the donee gets possession of the property given, the law that governs the devolution of the property would be the personal law of the donee. The mere fact that the donee is a person belonging to a different persuasion, by itself, is not sufficient to take the gift out of the ordinary incidents of the Muhammadan Law relating to gifts. (*Devadoss, J.*) AJAGAR HAZAR SAHEB *v.* ANNAMMAH. **100 I.C. 62=A.I.R. 1927 Mad. 572.**

—Gift—Mushaa.

——*Undivided share—Doctrine of Mushaa.*

Where the donor of an undivided share in certain properties has done all that lay in his power to put his donee in the same kind of (*i.e.*, constructive) possession as he himself had over the property, the gift is complete.

The doctrine of Mushaa ought to be confined within the strictest limits, being a doctrine wholly unadopted to a progressive state of society. 11 A. 460 (P.C.,) Ref. to. (*Sen, J.*) GANSI *v.* MAHOMED SHERIF. **124 I.C. 728=A.I.R. 1930 All. 793.**

——Under the Shafi Law "Mushaa" or the gift of an undivided share is not invalid. (*Wallace, J.*) MUHAMMAD NAINA MARACAIR *v.* UMMANAIKANI AMMAL. **A.I.R. 1930 Mad. 593.**

——*Gift of a definite share in immovable property—Rule of mushaa is inapplicable to such estate.*

A definite share in immovable property, zamindari, houses or shops, is a separate estate with separate and defined rents. The rule of mushaa, therefore, which aims at prohibiting confusion between estates gifted and not gifted is wholly inapplicable to such an estate: 35 Cal. 1 (P. C.); 11 All. 460 (P.C.), and 15 Cal. 684 (P.C.), Ref. 2 I.A. 87 (P.C.), Dist. (*Wazir Hasan and Srivastava, JJ.*) ZAHURAN *v.* ABDUS SALAM. **123 I.C. 857=7 O.W.N. 88= A.I.R. 1930 Oudh 71.**

MAHOMEDAN LAW—Gift—Mushaa.

——*Donor remaining in joint possession after gift—Gift offends against principles of Mahomedan Law.*

Although, according to the doctrines actually in force, the original strictness of the technical rule relating to mushaa has been considerably cut down, yet where the donor after the deed of gift remained in joint possession until after his death and administered the properties, and subsequent to his death one of his sons, one of the donees, remained joint with the rest and administered the property,

Held: that the gift offended against the rule of Mahomedan law as to mushaa and as to transfer of possession. (*Allanson and Sen, JJ.*) BIBI BILKIS *v.* WAHID ALI. **114 I.C. 204=83 P.L.T. 402= 7 Pat. 118=A.I.R. 1928 Pat. 183.**

A transfer of one-third of a specific extent of land and gift of the sale consideration to the donee is not open to objection under the Mahomedan Law. (*Dalal, J.*) ZULFIQAR ALI *v.* MT. KALLU. **112 I.C. 227 (All.)**

——*Gift of undivided share can be made by sale to proposed donee and then absolving him from debt.*

A gift of a moiety of a house can validly be effected by the donor selling it first at a fixed price and then absolving the debtor of the debt which was the price. (*Dalal and Pullan, JJ.*) MT. AHMADI BEGAM *v.* ABDUL AZIZ. **100 I.C. 644=49 All. 503= 25 A.L.J. 407=A.I.R. 1927 All. 345.**

As mushaa or an undivided share does not admit of actual possession, it cannot form the subject-matter of a valid gift. (*Zafar Ali, J.*) AHMAD HUSAIN *v.* QUMAR-UL-ZAMAN. **102 I.C. 829=9 L.L.J. 220= A.I.R. 1927 Lah. 413.**

——*Gift of mushaa by one co-sharer to another is invalid.*

Co-sharers are distinguishable from co-heirs. The gift of an undivided share by one co-sharer to another is not valid; 15 Cal. 684 (P.C.), Dist. (*Zafar Ali, J.*) AHMAD HUSSAIN *v.* QUMAR-UL-ZAMAN. **102 I.C. 829=9 L.L.J. 220=A.I.R. 1927 Lah. 413.**

——*Donee taking possession in definite shares cures defects due to* Mushaa.

Any defect in a gift due to *mushaa* can be cured by the donee, taking possession of the entire property gifted in definite shares. The doctrine of *mushaa* is one arising out of an archaic state of society and should be confined within the narrowest possible limits. 11 All. 460. Foll. (*Misra, A.J.C.*) MT. ZAIB-UN-NISSA *v.* IRSHAD HUSSAIN. **89 I.C. 284= 12 O.L.J. 354=2 O.W.N. 505= A.I.R. 1925 Oudh 504.**

——*Doctrine of* mushaa *should be confined to narrowest limits.*

The doctrine of *mushaa* is one arising out of an archaic state of society and should be confined within the narrowest limits. 11 All. 460 (P. C.), Foll. (*Daniels and Dalal, A. J. Cs.*) MT. HAFIZ-UN-NISA *v.* JAWAHIR SINGH. **66 I.C. 24=24 O.C. 374= A.I.R. 1921 Oudh 209.**

MAHOMEDAN LAW—Gift—Mushaa.

———*Gift of* mushaa *without apportionment to two donees.*

Where the only confusion or lack of definiteness is that a person who owns an entire property confers it on two donees without apportionment, the gift is valid, and the defect due to *mushaa* is cured by taking possession, in definite shares. (*Daniels and Dalal, A. J. Cs.*) MST. HAFIZ-UN-NISA *v.* JAWAHIR SINGH.

66 I.C. 24=24 O.C. 374=A.I.R. 1921 Oudh 209.

—Gift—Proof of.

Registration of gift deed suffices, attestation need not be proved. (*Mukerji, J.*) PANCHAM LAL *v.* MD. YAQUB KHAN. **92 I. C. 558=24 A.L.J. 313=A.I.R. 1926 All. 294.**

—Gift—Revocation.

———*Void gift need not be revoked.*

A void gift is inoperative and does not require revocation to cease to be enforceable, nor does the question of limitation arise for a suit to set aside. A.I.R. 1924 All. 370, Rel. on. (*Zafar Ali, J.*) AHMAD HUSSAIN *v.* QUMAR-UL-ZAMAN. **102 I.C. 823=9 L.L.J. 220=A.I.R. 1927 Lah. 413.**

———*Gift for natural love—Gift with condition—Revocability.*

If the gift is one made by a Muhammadan on account of natural love and affection he may revoke it. But, where the gift is burdened with something to be done by the donee, and if the donee does that which is required by the donor to be done, the gift becomes irrevocable. Where the donor stipulates that the donee should discharge the debts of the donor but it is not stipulated that he should pay them from his separate property, it is immaterial whether the debts are paid from the gifted property or from donee's separate properties. (*Devadoss, J.*) AJAGAR HAZAR SAHEB *v.* ANNAMMAH. **100 I.C. 62=A.I.R. 1927 Mad. 572.**

———When once delivery has been made, a gift under Muhammadan Law is not revocable if the conditions of the gift have not been broken. (*Le Rossignol, J.*) HAKIM DIN *v.* QUTAB DIN. **92 I.C. 264=A.I.R. 1926 Lah. 211.**

———*Gift to son-in-law.*

A gift in favour of the son-in-law is not irrevocable on the ground of its being made to a person within the prohibited degrees of marriage. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) IMDAD ALI *v.* AHMAD ALI. **85 I.C. 400=28 O.C. 55=A.I.R. 1925 Oudh 518.**

———*Waiver.*

The donor may revoke the gift even where he has purported to waive his right of revocation at the time of or after the declaration of gift; provided that where he has accepted something in return for the waiver he cannot revoke this gift.

Where the donor waived his right of revocation in consideration of the services that had been rendered by the donee,

Held, that he could not revoke the gift. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) IMDAD ALI *v.* AHMAD ALI. **85 I.C. 400=28 O.C. 55=A.I.R. 1925 Oudh 518.**

———*Gift*—In presenti.

A deed executed by a Mohammadan lady purported to transfer certain property to her daughter in consideration of her promise to maintain the mother during her life-time and pay her funeral expenses after her death. The possession of the properties was in fact handed over to the daughter. *Held*, the deed was a deed of gift *in presenti*, and that it was valid and not revocable. (*Schwabe, C. J. and Wallace, J.*) FATIMA BIBI *v.* KHAIRUM BIBI. **16 M.L.W. 894=A.I.R. 1923 Mad. 52.**

MAHOMEDAN LAW—Gift—Validity of.

—Gift—Subject of.

———*Anything which is included in "Mal" can be gifted.*

Under the Mahomedan Law anything over which dominion or the right of property may be exercised, or anything which exists either as a specific entity or as an enforceable right, or anything in fact, which comes within the meaning of the word "mal" may form the subject of gift. Ameer Ali's Muhammadan Law, 4th Edn., p. 64, Ref. (*Stuart, C. J. and Raza, J.*) ABID HUSAIN *v.* MANNO BIBI. **102 I.C. 72=2 Luck. 496=1 L.C. 50=A.I.R. 1927 Oudh. 251.**

———*Equity of redemption.*

Quaere: Whether the equity of redemption, when the property is in the possession of the mortgagee, could form the subject-matter of a valid gift according to Mohamedan law. (1921) 43 Bom. 1296, Foll.; (1882) 6 Bom. 650, Diss. from; (1899) 23 Bom. 682, Dis.; (1888) 11 All. 1, Appr. (*Macleod, C. J. and Shah, J.*) HASHIMBI YAKUBSAHIB BEG *v.* AJAMATBI MAKTUM SAHIB. **80 I.C. 208=48 Bom. 396=26 Bom. L.R. 337=A.I.R. 1924 Bom. 410.**

———*Property in possession of—Adverse possessors—Property in possession of mortgagee.*

The essentials of a valid gift, according to Mahomedan Law are *aqd* (tender and acceptance or declaration and assent) and *milk* (seisin). By possession in connection with the law of gift, is meant such possession as the nature of the subject of the gift is capable of. Where a property to which a person is rightfully entitled happens to be in the hands of another claiming adversely to him, the rightful owner may make a gift of the same to a third person, provided he puts the donee in a position to recover the property, by divesting himself so far as he can of the whole of what he gives. Under Mahomedan Law the right of the equity of redemption, like other incorporeal right, may be made subject of a valid gift, and the fact that the possession is with the mortgagee does not invalidate it. (*Chatterjee and Suhrawardy, JJ.*) TARA PRASANNA SEN *v.* SHANDI BIBI. **62 I.C. 481=49 Cal. 68=25 C.W.N. 761=A.I.R. 1922 Cal. 422.**

———*Equity of redemption.*

A gift by a Mahomedan of the equity of redemption without possession is bad. As the gift does not take effect, the grantor continues to be the owner of the land and could effect a valid sale in respect thereof. 61 P. R. 1871, Foll. (*Abdul Raoof and Harrison, JJ.*) SHARIF HUSSAIN *v.* RUKAN DIN. **70 I.C. 493=A.I.R. 1922 Lah. 40.**

———*Tangible property held adversely to donor—Possession not recovered by donor and given to donee—Gift is not complete.*

Where the subject of gift, being some kind of incorporeal property or an actionable claim, is not susceptible of physical possession, the gift may be completed by any appropriate method of transferring all the control that the subject-matter admits of. But the ownership of tangible property, of which the donor claims to be entitled to the actual present possession, cannot be transferred by way of gift unless and until the donor obtains and delivers possession, or enables the donee to obtain possession. So where the property is in the possession of another who holds it adversely to the donor, the donee can get no title to it until possession is recovered from the adverse possessor and given to the donee. 11 All. 1. Foll; 15 Cal. 684, Dist. (*Mookerjee, A.C.J. and Fletcher, J.*) SAMSUL NEHAR *v.* MOHIUDDIN AHMAD. **59 I.C. 355=25 C.W.N. 310=A.I.R. 1921 Cal. 225.**

—Gift—Validity of.

Gift of undivided share by one co-sharer to another

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is not invalid. (*Banerji and King, JJ.*) HABIB BAKSH *v.* AMINA BIBI. **115 I.C. 129=A.I.R. 1929 All. 312.**

———*Hanafi School—Gift of undivided share.*

According to the Hanafi School the gift of an undivided share (mushaa) of property which is in its nature divisible or forms part of a thing capable of physical partition or division, is invalid. The doctrine is inapplicable where the subject of the gift forms part of a thing that is incapable of division, or is of such a nature that some kind of benefit or advantage can be derived from it only so long as it is undivided, which cannot be derived from it after division. 11 All. 460 (P.C.); 35 Cal. 1 (P.C.), Rel. on. (*Addison and Tek Chand, JJ.*) FAYYAZ-UD-DIN *v.* KUTAB-UD-DIN. **116 I.C. 899=10 Lah. 761=30 P.L.R. 288= A.I.R. 1929 Lah. 309.**

———*Gift of remainder is invalid.*

Where a Mahomedan gifted property to his wife giving her an absolute power of disposal over it and subsequently adding that whatever might be left after her death would go to some third parties and not to the heirs of the lady,

Held: that the deed was a deed of absolute gift and not a deed of family arrangement and, therefore, the conditions subsequent on the happening of which there is to be the gift over in favour of third parties should be regarded as invalid.

Under the Mahomedan law it is not competent to a person to give by way of gift the remainder of property, which is made over to a person, as such a gift cannot be accompanied by possession of property. 24 M.L.J. 258, Rel. on. (*Srinivasa Ayyangar, J.*) NABOOMA *v.* KHEDAR HUSSAIN. **108 I.C. 637= A.I.R. 1928 Mad. 613.**

———*Hanafi School—Conditions derogating from gifts are void.*

According to the Hanafi Law any derogation from the completeness of the gift is null, and, if the intention to give to the donee the entire subject-matter of the gift be clear, subsequent conditions derogating from or limiting the extent of the right would be null and void. (*Findlay, J.C. and Macnair, A.J.C.*) MAHEBUX HUSSAIN *v.* NASIRUDDIN **105 I.C 75= A.I.R. 1928 Nag. 44.**

———*Gift* in presenti *and gift in future.*

There can be no doubt that a gift under Mahomedan law to be valid must be a gift *in presenti* and not in future. Though it may not be necessary, where a deed of trust creates a number of successive interests, that every one of the donees should be ready and willing to accept the gift at once, it is clear that the immediate donee must be in such a position for the gift to be valid. A gift by a donor to himself is clearly no real gift at all and reservation in the deed of settlement of a life-interest in the settlor results in there being no gift at all *in presenti* but in the gift taking effect only on the settlor's death. 9 Cal. 138; 36 Cal. 431; 34 Bom. 604; A.I.R. 1916 P.C. 27 and A.I.R. 1922 Oudh 93, Cons. and Rel. on; 11 M.I.A. 517, Dist.

The terms of the trust created by a Shiah Muhammadan lady in favour of a certain person were as follows :—"The trustee shall pay the income of the property to the settlor during her life, that on her death the trustee shall pay the income to her husband, that on his death the trustee shall pay the income to her son and daughter, that after their death the income is to go to their children and that on the attainment of the age of 18 by the youngest grandchild the property is to be made over outright to the grandchildren. The payment of the income to the settlor during her life is subject to a reduction of 15 per cent.

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to be kept by the trustee as commission." A grandchild of the lady, who claimed that the trustee had been wasting the property, sued praying that the trustee be removed from the trusteeship.

Held, that the so-called deed of gift or trust did not effect any gift *in presenti* but the gift was to become operative only on the death of the donor. The gift therefore is not a gift *inter vivos* under the Mahomedan law. (*Rutledge, C. J. and Brown, J.*) MIRZA HASHIM MISHKEE *v.* A. A. H. BINDANEE. **113 I.C. 255=6 Rang. 343= A.I.R. 1928 Rang. 323.**

———*Part capable of delivery and part not—Whole is valid.*

Where a person makes gift of certain items some of which he cannot at once deliver into the hands of the donee, it would not be right to hold that the whole gift is invalid or that portion of gift relating to the property which could not be delivered into the hands of the donee is invalid. It would be against the clear intention of the donor to declare that a portion of the gift is invalid when he intended that the whole of it should be valid. (*Devadoss, J.*) AJAGAR HAZAR SAHEB *v.* ANNAMAH. **100 I.C. 62=A.I.R. 1927 Mad. 572.**

———*Shiah Law—Gift of a deferred estate.*

Under the Shiah Law the creation of a life-estate and the gift of a deferred estate, which would amount to a vested remainder in English Law, is clearly permissible and such a power can be exercised by a Shiah Mahomedan in respect of immovable property of any character whatsoever. A. I. R. 1922 Oudh 93 and 32 Bom. 172, Foll. (*Stuart, C. J. and Gokaran Nath Misra, J.*) WAHIBUNNISSA *v.* MUSHAF HUSSAIN. **95 I.C. 113=2 Luck. 187=13 O.L.J. 278= 3 O.W.N. 434=A.I.R. 1927 Oudh 328.**

———*Shiah Law—Creation of vested remainder in favour of unborn person is invalid though made through a trustee.*

Although a Shiah may create a life-interest and a vested interest to take effect after the expiry of a life-interest, he cannot create such a vested remainder in favour of unborn persons and the mere fact that such settlement is made through a trustee will not validate it inasmuch as the settlement through a trustee is nothing more than a gift to the beneficiary through another person and must conform to all the rules relating to a gift and as a gift requires proposal and acceptance, a trustee cannot accept the gift on behalf of unborn persons. A. I. R. 1922 Oudh 93, Rel. on. (*Chari, J.*) MIRZA HASHIM MISHKEE *v.* AGA ABDUL HOOSAIN BINDANEE. **103 I.C. 189=5 Rang. 252= A.I.R. 1927 Rang. 242.**

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———*Gift of a life-estate operates as gift of absolute estate.*

Per *Ashworth, A. J. C.* (*Wazir Hasan, A. J. C. dissenting*).—The owner of an estate may retain what is virtually a life-estate, but he cannot transfer anything more than a mere use. If he purports to transfer something more than the use, namely, a use which is not revocable during the term for which it is granted, and which can be lent or leased to another or otherwise alienated, he will be held to have

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transferred not only the use, but also the *corpus*. Under Muhammadan law, a life-estate can only be created by reservation after the transfer of the *corpus*. It cannot be created by transfer to another whether the *corpus* is retained or not by the donor. The gift of a life-estate will be construed as a gift of an absolute estate. (*Case-law and original texts discussed.*) (*Wazir Hasan and Ashworth, A. J. Cs.*) AMJAD KHAN *v.* ASHRAF KHAN. **87 I.C. 445=2 O.W.N. 83=28 O.C. 265=A.I.R. 1925 Oudh 568.**

——*Gift of—Equity of redemption—Donee getting possession of part only immediately.*

Where the possession of a part of the property given by way of gift was transferred immediately to the donee, and as regards the rest of the property which was in mortgagee's possession, the donee in fact got possession from the mortgagee after the donor's death in pursuance of the gift, the gift as a whole should be accepted as satisfying the essential condition as to the transfer of possession in pursuance of the gift.

Quaere : Whether the equity of redemption, when the property is in the possession of the mortgagee, could form the subject-matter of a valid gift according to Mahomedan law. (1921) 45 Bom. 1296, Foll.; (1882) 6 Bom. 650, Diss. from ; (1899) 23 Bom. 682, Dist. ; (1888) 11 All. 1, Appr. (*Macleod, C. J. and Shah, J.*) HASHIMBI YAKUBSAHEB BEG *v.* AJAMATBI MAKLUM SAHIB. **80 I.C. 208=48 Bom. 396=26 Bom. L.R. 337=A.I.R. 1924 Bom. 410.**

——*Absence of intention to transfer will invalidate gift only when shared both by donor and donee.*

Once it is found that the donee did not share any absence of intention to make the deed effectual, the taking of possession by the donee will make the gift complete, whatever the intention of the donor may be. The argument that, because the gift was to a son there would be no acceptance or taking of possession, would not apply in the case where the gift was to the son through trustees. 21-A 87, Dist. (*Ashworth and Simpson A.J.Cs.*) SARF-UZ-ZAMAN *v.* SIR HENRY STANYON. **70 I.C. 253=25 O.C. 291=10 O.L.J. 491=A.I.R. 1923 Oudh 80.**

——*Donor retaining usufruct of part of property—Possession of other parts delivered—Gift is valid.*

Where a Mahomedan wife by a deed bestowed with possession a part of the property during her lifetime on a brother of her husband and retained the usufruct only of the rest of her property which was to pass to the donee on her death,

Held, the deed by her was intended to be, and to operate as, an immediate and irrevocable disposition of all her property, subject to the reservation, for her own use during her lifetime, of the usufruct of the property in question, and it must be construed as a deed, of gift and not as a will. The reservation of the usufruct did not by itself make the gift of the property now in question void under Mohammedan Law. The whole Zamindari property mentioned in the deed not parts of it only, must, for the purposes of this case, be regarded as one property, the taking possession of any part of it being constructively a taking possession of the whole. 48 I.A. 135; 11 M.I.A. 517; Foll. (*Sir John Edge.*) MOHAMMAD ABDUL GHANI KHAN *v.* MT. FAKHR JAHAN BEGAM. **68 I.C. 254=44 All. 301=25 O.C. 95=9 Oudh L.J. 369=31 M.L.T. 21=49 I.A. 195=24 Bom.L.R. 1268=27 C.W.N. 53=20 A.L.J. 994=37 C.L.J. 1=A.I.R. 1922 P.C. 281=43 M.L.J. 453. (P.C.)**

——*Condition against alienation in a gift deed.*

In a gift under the Muhammadan Law the provision that the donee shall have no right of transfer is void and the donee takes an absolute estate. (*Piggott and Walsh, JJ.*) BABU LAL *v.* GHANSHAM DAS. **70 I.C. 84=44 All. 633=20 A.L.J. 466=A.I.R. 1922 All. 205.**

MAHOMEDAN LAW—Guardianship—Custody.

—Gift—Miscellaneous.

——*Gift to mosque.*

A mosque is recognized as a juristic person and a valid gift of immovable property can be made in favour of a mosque. (*Shadi Lal, C. J. and Le Rossignol, J.*) MAULA BAKSH *v.* HAFIZ-UD-DIN. **94 I.C. 7=8 L.L.J. 156=27 P.L.R. 256=A.I.R. 1926 Lah. 372.**

——*Creation of tarwad by gift is opposed to ordinary Muhammadan Law.*

Under the Muhammadan Law a gift to a person enures for his benefit and the creation of a tarwad with all the incidents of a Marumakkathayam tarwad is opposed to the ordinary Muhammadan Law. But in the case of the Moplahs of North Malabar the Customary Law by which property could be held by a tarwad applies to them. In other words, the North Malabar Moplahs follow the Marumakkathayam Law. But such a custom does not obtain among Moplahs of Calicut and they are governed by the ordinary Muhammadan Law and are not entitled to make a gift of property to a woman and her children to be held as tarwad property. That devolution of property under a bequest or gift which is repugnant to the personal law of the testator or donor is invalid. I.A. Sup. Vol. 47. (*Devadoss and Waller, JJ.*) DASA NAICKEN *v.* KUNHA AHMAD KOYA. **93 I.C. 5=24 M.L.W. 231=A.I.R. 1926 Mad. 648=51 M.L.J. 69.**

——*Ariat—Essentials.*

"*Ariat*" is a term used in the Hanafi Law for a gratuitous loan and the essentials of an *ariat* are: (1) that it can be revoked ; (2) that it cannot be a transfer of property ; (3) that it must be for a definite period, and (4) that it does not devolve upon the heirs of the recipient. (*Kendall and Pullan, A. J. Cs.*) MOHAMMAD SHER KHAN *v.* MT. KAMAL-UN-NISSA. **79 I.C. 716=11 O.L.J. 703=27 O.C. 397=A.I.R. 1925 Oudh 289.**

——*Gift without delivery of possession—Limitation to set aside.*

Where a deed of gift is executed by a person governed by the Muhammadan law and the possession of the property comprised in the gift has not been delivered the gift would be void *ab initio* and no question of limitation will arise in such circumstances. The right of the plaintiff to impeach such a gift can only accrue from the moment when by receipt of possession the gift becomes operative by law. (6 All..207, Foll.). (*Kanhaiya Lal and Mukerji, JJ.*) MT. MAULANI *v.* MAULA BAKSH. **78 I.C. 222=46 All. 260=22 A.L.J. 149=5 L.R.A. Civ. 104=A.I.R. 1924 All. 370.**

——Under Muhammadan Law a gift may be made either directly or by means of a trust. (*Marten, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* YUSUF ALI EBRAHIM **84 I.C. 759=24 Bom. L.R. 1060=A.I.R. 1921 Bom. 338**

—GUARDIANSHIP.

Custody.

De facto.

Delegation.

—Guardianship—Custody.

——*Mother—When disqualified.*

Under Mahomedan law the mother is disqualified from the guardianship even of her minor daughter if she is married to a man who is not related to the minor within the prohibited degrees. (*Pullan, J.*)

MAHOMEDAN LAW—Guardianship—Custody.

ANSAR AHMED *v.* SAMIDAN. **106 I.C. 822=5 O.W.N. 87=A.I.R. 1928 Oudh 220.**

———*Father is the natural guardian of his minor boy, but mother is entitled to his custody up to seven years.*

By the Muhammadan Law the father is the natural lawful guardian of his minor boy until by some order of a competent Court he is deprived of his rights as such, and is automatically entitled to exercise the rights of a guardian without any order of a Court appointing him.

Side by side with the right of the father as the lawful guardian exists the recognized right of the mother by Muhammadan Law to have the custody of the child up to the age of seven. (*Walsh and Banerji, JJ.*) MT. ULFAT BIBI *v.* BAFUTI **102 I. C. 103=49 All. 773=25 A. L. J. 585=A. I. R. 1927 All. 581.**

———*Divorced mother—Rights of.*

A woman who has been divorced and has married a second husband is not a person better suited to have the custody of the minor child than the father, however unsuitable the father may be, and is not a person who ought to be heard to say that the father is unsuitable. She loses the right to assert a claim against the father for the child. (*Walsh and Banerji, JJ.*) ULFAT BIBI *v.* BAFATI. **102 I. C. 103=25 A. L. J. 585=49 All. 773=A. I. R. 1927 All. 581.**

———Divorce is not always a disqualification to the appointment of a mother to be a guardian of her minor children. If she is of good character she retains her right after separation from her husband, even although she may have been divorced from him. (*Scott-Smith, J.*) MT. ZAINAB BIBI *v.* ABDUL KAREEM. **89 I. C. 865=A. I. R. 1926 Lah. 117.**

———*Mother's right.*

Under the Mahomedan Law a mother's right to the custody of her children ceases on their completing the seventh year but she still has a right of access to her children, but there is no right of suit to enforce such access under the Guardian and Wards Act. (*Rigg, J.*) HAZARA BIBI *v.* SULAIMAN HAJI MAHOMED. **59 I. C. 562=13 Bur. L.T. 86.**

———*Custody of a boy up to 7 years belongs to mother—Onus of proving that mother is not entitled is on him who asserts it.*

In Mohamedan Law the custody of a boy until, at any rate, the age of seven belongs to the mother. The burden, therefore, of proving that the mother in a particular case is not entitled to be the guardian of her infant son lies heavily on any one who would assert it. No will of the father of the boy can have the power to take away that right from her. (*Kincaid, J. C.*) MST. BIBI FATMA *v.* BAKARSHAH.

66 I.C. 888=15 S.L.R. 175=A.I.R. 1921 Sind 45.

———Mother loses her right after remarriage with stranger. (*Kincaid, J. C.*) MST. BIBI FATMA *v.* BAKARSHAH. **66 I.C. 888=15 S.L.R. 175=A.I.R. 1921 Sind 45.**

—Guardianship—De facto—Admissions.

———*Effect.*

A *de facto* guardian under the Muhammadan Law has no power to bind the interest of the minor by his statements or to affect his interest in the property. The statements made by such a person may be taken into consideration as any other evidence. (*Chatterjee and Panton, JJ.*) BASARAT SARKAR *v.* HIRA PRAMANIK. **65 I.C. 353=A.I.R. 1922 Cal. 287.**

—Guardianship—De facto—Alienation.

———*Alienation by* de facto *guardian is void.*

MAHOMEDAN LAW—Guardianship—De facto——Arbitration.

A person who is not under the law authorized to transfer a minor's property cannot give a valid title to the transferee of such property and the transfer effected by a person who thus arrogates to himself the functions of a lawful guardian is absolutely void and of no legal effect. A.I.R. 1918 P. C. 11, Foll. (*Tek Chand and Agha Haidar, JJ.*) ZINDA *v.* MT. ROSHNAI. **113 I.C. 53=10 L.L.J.183=A.I.R. 1928 Lah. 251.**

———A *de facto* guardian of a Muhammadan minor is a pure and simple outsider or *fazuli* and he cannot bind the property of the minor by any act of his whether there be any necessity or benefit to the minor. 45 C. 878 (P.C.), Foll. (*Stuart and Mukerji JJ.*) GANESHI LAL *v.* NOBIN CHANDRA. **78 I.C. 1024=A.I.R. 1925 All. 36.**

———A natural guardian under the Muhammadan Law has no power to deal with the property of the minors and an alienation made by him or her would be altogether null and void. (*Moti Sagar, J.*) MT. SAHAN *v.* SHADI. **79 I.C. 579=A.I.R. 1923 Lah. 601.**

———Alienation by *de facto* guardian even for legal necessity is invalid. (*Batten, J. C. and Hallifax, A. J. C.*) BHURIBHAI *v.* ISHAK HUSEN. **69 I.C. 619=A.I.R. 1923 Nag. 83.**

———A sale by a *de facto* Mahomedan guardian if effected for imperative necessity or for a purpose which is found to be beneficial to the minor, must be upheld. (*Wilberforce and Martineau, JJ.*) MAHAND *v.* MT. BHOLI. **64 I.C. 51. (Lah.)**

———De facto *guardian cannot alienate minor's immovable property.*

Under the Muhammadan Law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a "*de facto* guardian," has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant. 45 Cal. 878 (P. C.). Foll. (*Kanhaiya Lal, J. C. and Daniels, A. J. C.*) KANDHAI LAL *v.* MAHOMED ALAM. **63 I.C. 525=8 O.L.J. 324=A.I.R. 1921 Oudh 160.**

—Guardianship—De facto—Arbitration.

———*Agreement to refer to arbitration by—Validity.*

No doubt agreement to refer to arbitration executed by a Mahomedan mother on behalf of her minor children cannot be considered to be binding on them and the award is an inoperative document as an award, but if the scheme of distribution promulgated in the award is in no way perverse or unfair or influenced by any corruption or misconduct of the arbitrators and has been followed without any objection whatever for a long period extending over 14 years can well be recognized as a family settlement and should not be disturbed. Even if the agreement and the award based thereon are both legally inoperative documents, the settlement relating to the family property laid down in the award should be considered to be a valid family settlement. 35 All. 337 (P.C.), Rel. on; A.I.R. 1918 P.C. 11; 47 Cal. 713 and A. I. R. 1928 Oudh 449, Expl. (*Misra and Srivastava, JJ.*) AMEER HASAN *v.* MD. EJAZ HUSAIN. **117 I.C. 456=6 O.W.N. 51=A.I.R. 1929 Oudh. 134.**

———*Mother* de facto *guardian of minors—Agreement to refer dispute on behalf of minors—Minors are not bound.*

A *de facto* guardian of minors is not competent under the Mahomedan law to enter on their behalf

MAHOMEDAN LAW—Guardianship — De facto—Arbitration.

into an agreement to refer to arbitration any dispute, even where there is no *de jure* guardian of the minors as such agreement would necessarily, if acted upon, involve dealings with the immovable properties of the minor.

Where a widow executes an agreement to refer to arbitration a dispute between her and her minor son on one side and a rival claimant on the other, the agreement even if held binding on the widow cannot be binding on the minor son and so also decree following the award based on such agreement is not binding on them : 5 O. C. 197, Foll. ; 19 Bom. 571, Dist. (*Gokaranath Misra and Nanavatty, JJ.*) MD. JAMIL ATA *v.* MD. HOFZ ATA. **112 I.C. 522= 5 O.W.N. 847=A.I.R. 1928 Oudh 449.**

———*De facto* guardian cannot refer to arbitration dispute about the property of the minor, 47 Cal. 713 ; 34 All. 213 (P.C.) and A.I.R. 1918 P.C. 11. Foll.; 29 I.C. 800 ; 19 Cal. 334 ; 8 I.C. 647 and 11 I.C. 481, Dist.; Lah. Civil Appeal No. 1654 of 1912, Doubted and Dist. (*Jai Lal, J.*) MUZAFARDIN *v.* GHULAM ABBAS. **111 I.C. 82 (Lah.).**

———*Agreement to refer to arbitration.*

The mother who is not the *de jure* guardian of infants is not competent to enter into an agreement to refer to arbitration where such agreement, if acted upon, would necessarily involve dealings with the minors' properties. 45 Cal. 878 (P.C.), Foll. (*Teunon and Beachcroft, JJ.*) MOHESENUDDIN AHMAD *v.* KHABIRDUDDIN AHMAD. **26 C.W.N. 246= A.I.R. 1921 Cal. 818.**

—Guardianship—De facto—Brother.

———*Rights of.*

Under the Muhammadan Law, a brother is not entitled to be a guardian of the property of his minor brothers and, therefore, an alienation of the immovable properties of a minor by his brother is void. (*Shadi Lal, C. J. and Hilton, J.*) ILAM DIN *v.* BUTA. **120 I.C. 171.**

———Brother is not legal guardian—If he, without being authorized by legal guardian assumes management minor's property, he cannot impose obligations on minor except such as afford protection to his estate. (*Sen and Niamatullah, JJ.*) RAM AUTAR KURMI *v.* GHULAM DASTGIR. **115 I.C. 646=51 All. 589= 1929 A.L.J. 355=A.I.R. 1929 All. 250.**

———*Brother cannot be legal guardian.*

Under the Mahomedan Law a brother is not entitled to be the legal guardian of the property of his minor brother and he has no power to transfer property belonging to the minor. A.I.R. 1918 P.C. 11, Foll. (*Shadi Lal, C. J. and Bhide, J.*) FATEH DIN *v.* GURUMUKH SINGH. **113 I.C. 227=30 P.L.R. 560= 10 Lah. 385=A.I.R. 1929 Lah. 810.**

A brother is not entitled to be a guardian of the property of his minor brothers ; and an alienation of the immovable property of a minor by a person, who is neither a guardian appointed by the Court nor a guardian recognized by the personal law, is void, and the transferee cannot enforce the alienation against minor: A.I.R. 1918 P.C. 11, Foll. (*Shadi Lal, C.J. and Hilton, J.*) ILAM DIN *v.* BUTA. **120 I.C. 171 (Lah.)**

—Guardianship—De facto—Compromise.

C. P. Code O. 32, R. 7—Mahomedan mother acting as next friend of minor can by compromise in suit sell minor's property. A.I.R. 1918 (P.C.), 11, Dist. (*Shadi Lal, C.J., and Bhide, J.*) BADAR DIN *v.* MT. NATHO. **115 I.C. 855=11 L.L.J. 14=30 P.L.R. 116= A.I.R. 1929 Lah. 279.**

MAHOMEDAN LAW—Guardianship—De facto—Mother.

—Guardianship—De facto—Contracts.

De facto guardian cannot bind minor by contracts entered into by him. 45 Cal. 878 (P.C.), Rel. on. (*Greaves and Cuming, JJ.*) HUSENA BANOO *v.* BROJENDRA KISHORE ROY. **89 I.C. 373= A.I.R. 1926 Cal. 82.**

—Guardianship—De facto—Discharge.

De facto guardian cannot give valid discharge. 45 C. 878 (P.C.), Foll. (*Scott-Smith, J.*) ABDUL RAZAK *v.* ABDUL RAHMAN. **85 I.C. 632= A.I.R. 1925 Lah. 541.**

—Guardianship—De facto—Extent of power.

A *de facto* guardian can only deal with the minor's property at his own risk and his acts are like those of any other person who arrogates to himself the power of transferring another's property. He can incur liability but can impose no obligation on the infant. This general rule is subject to certain well-defined restrictions such as acts arising out of the wants of an infant but even in such a case it appears that the guardian is only entitled to deal with the moveable property of the infant and cannot pledge or sell the infant's immoveable property. 45 Cal. 878, (P.C.) Foll. (*Ryves, J.*) ABDULLAH KHAN *v.* MAHBUB ULLAH KHAN. **76 I.C. 556=A.I.R. 1923 All. 485.**

—Guardianship—De facto—Mother.

Mother is not the legal guardian of the property of her minor children. 47 Cal. 713, Foll. (*Jai Lal, J.*) MUZAFARDIN *v.* GHULAM ABBAS. **111 I.C. 82 (Lah.).**

———A mother under the Mahomedan Law has no power as *de facto* guardian of her infant children to alienate or charge their immovable property. A.I.R. 1918 P.C. 11, Foll. (*Hasan and Raza, JJ.*) GHISA *v.* WAHAJ-UD-DIN. **109 I.C. 110=5 O.W.N. 236.**

———*Widow cannot contract on behalf of her minor children.*

A Mahomedan widow is not competent to enter into an agreement to enter into a partnership binding on her minor children. A.I.R. 1918 P.C. 11, Foll. (*Carr and Cunliffe, JJ.*) A. KHORASANG *v.* C. ACHA. **110 I.C. 349=6 Rang. 198=A.I.R. 1928 Rang. 160.**

———Sale by mother of her minor son's property is void *ab initio.* (*Dalip Singh and Harrison, JJ.*) POKHAR DAS *v.* MELA RAM. **102 I.C. 755= A.I.R. 1927 Lah. 773.**

———*Sunni Law—Uncles or mother of minor are not legal guardians and cannot transfer the property of minor.*

The only person who can validly transfer the interest of the minors is their legal guardian, that is, their guardian *de jure*, in accordance with the principles of law obtaining among the Sunni sect of the Mahomedan community or the guardian appointed by the Court. Neither the uncles nor the mother of the minors in fact or in law occupy the position of legal guardians.

The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. 45 Cal. 878 (P.C.), Foll. (*Cuming and Page, JJ.*) DEBI RAM PATNI *v.* MOBESWAR ALI LASKAR. **97 I.C. 621=45 C.L.J. 222.**

———*Alienation by—Setting aside—Right of alienee to value of improvements.*

Where a sale effected by a Mahomedan mother of the property of her infant son was set aside, *Held*, that the vendee was entitled, on equitable grounds, to be compensated for such improvements as had been effected by him in good faith. (*Tek Chand and Currie, JJ.*) CHARANJI LAL *v.* TOTA RAM. **31 P.L.R. 732.**

MAHOMEDAN LAW—Guardianship — De facto—Mother.

———*Mother marrying into stranger family—Right of guardianship if lost.*

Where a Mahomedan lady married a person who was an outsider so far as the family was concerned, *held* that she lost her status as guardian of her minor children. (*C. C. Ghose and Pearson, JJ.*) HARBHORSHA MAHOMED *v.* JHAPURAN BIBI. **51 C.L.J. 476.**

———*Powers of alienation.*

A Muhammadan mother has no power to alienate the property of her minor son. Such alienation is void *ab initio* and the alienee's position is no better than that of a trespasser. [45 Cal. 878, Foll.] (*Zaffar Ali and Addison, JJ.*) RANG ILAHI *v.* MAHBUB ILAHI. **94 I.C. 25=7 Lah. 35=27 P.L.R. 210=A.I.R. 1926 Lah. 170.**

———*Alienation of immovable property by* de facto *guardian is invalid.*

An alienation of immovable property by a Mahomedan woman acting as the *de facto* guardian of her minor son does not confer a valid title on the alienee, even if the alienation be for the personal benefit of the minor. 45 Cal. 878 (P.C.), Foll. (*Moti Sagar, J.*) JHANDA *v.* SAPURAN SINGH. **85 I.C. 772=A.I.R. 1925 Lah. 509.**

———*Setting aside alienation by* de facto *guardian—Minor is liable to satisfy ancestral debt to the extent of his share in assets before getting possession.*

A Mahomedan who sues to recover immovable property alienated by his mother as his *de facto* guardian during his minority is liable to satisfy any ancestral debt to the extent of his share in the assets before he can recover possession of his share in the property. 25 C.W.N. 258, Foll. (*Moti Sagar, J.*) JHANDA *v.* SAPURAN SINGH. **85 I.C. 772=A.I.R. 1925 Lah. 509.**

———*Powers of alienation.*

Under the Muhammadan Law a person who has charge of the person or property of a minor without being his legal guardian and who may therefore be conveniently called a *de facto* guardian has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant; nor can such a transferee if let into possession of the property under such unauthorised transfer resist an action in ejectment on behalf of the infant as a trespasser. 45 Cal. 878 (P.C.), Foll. (*Campbell, J.*) MUHAMMAD SADDIQ *v.* KHUDA BAKHSH. **80 I.C. 506=6 L.L.J. 227=26 P.L.R. 271=105 I.C. 655=A.I.R. 1924 Lah. 564.**

———*Sale by mother as guardian is void.*

A mother under the Mahomedan Law has no power to dispose of the immovable property belonging to her minor children and a sale by her of their property is void. (45 Cal. 878 (P. C.), Foll.) (*Raoof and Fforde, JJ.*) MAHOMED SHAFI *v.* MT. KALSUM BI. **79 I.C. 260=4 Lah. 467=A.I.R. 1924 Lah. 200.**

———Alienation by *de facto* guardian in lieu of debts binding on minors—Minors are entitled to recover possession subject to paying debts. [45 Cal. 878 (P.C.), Foll.] (*Mookerji, A. C. J. and Fletcher, J.*) LALOO KARIKAR *v.* JAGAT CHANDRA. **62 I.C. 428=33 C.L.J. 256=25 C.W.N. 258=A.I.R. 1921 Cal. 572.**

———Under the Mahomedan Law, a mother as the *de facto* guardian of her minor daughter cannot alienate the property of the minor. (*N.R. Chatterjee and Panton, JJ.*) ASHIR-UD-DIN MAHOMED *v.* TAHER MAHOMMAD. **59 I.C. 306. (Cal.)**

MAHOMEDAN LAW— Guardianship—De facto—Rights of alienee.

—Guardianship—De facto—Pre-emption.

Guardian *de facto* cannot consent to a sale so as to affect minor's right to pre-emption.

Paternal uncle cannot, as *de facto* guardian, consent to a sale so as to affect the rights of his minor nephew to claim pre-emption of the property sold. (*Lindsay and Kanhaiya Dal, JJ.*) AMIR HAIDAR *v.* ALI AHMAD. **88 I.C. 234=47 All. 635=23 A.L.J. 404=6 L.R.A. Civ. 357=A.I.R. 1925 All. 424.**

—Guardianship—De facto — Prior contract by father.

———*Sale by* de facto *guardian is valid.*

Where mother gave possession of a field, under a contract entered into by her husband, to *A* and though the deed of sale did not mention that she executed that document also on behalf of her minor sons but it was clear that she completed the sale in pursuance of her husband's agreement,

Held, that *A's* possession could not be disturbed as the alienation was made not on the woman's own account but in discharge of an obligation made by her husband and as regards the sons in pursuance of a contract made by their ancestor. 12 C.P.L.R. 154; 41 Bom. 438; A.I.R. 1922 Bom. 9; 1 All. 533, Foll. (*Prideaux, A.J.C.*) SHEIKH AHMAD *v.* AMIRKHAN. **107 I.C. 905=A.I.R. 1928 Nag. 211.**

———*Alienation arranged by minor's father and carried out by guardian after the father's death is binding.*

Under the Muhammadan Law the father is entitled to deal with the properties as he likes and the sons cannot question any alienation made by him. An alienation which is arranged to be made by their father and carried out by their guardian after his death cannot be questioned by them.

Even if the sons had a right to the property independent of the father, the sale by their guardian for the purpose of discharging a debt incurred in the lifetime of their father is a prudent act and is one which is binding upon the sons. (*Spencer and Devadoss, JJ.*) ABDUL RAHMAN *v.* RITHUMANSA ROWTHER. **85 I.C. 945=A.I.R. 1925 Mad. 997.**

—Guardianship—De facto—Ratification.

———The transaction by a fazuli is incapable of ratification by the owner on attaining majority: A.I.R. 1918 P.C. 11, Foll. (*Kinkhede, A.J.C.*) GULAM JAFFAR *v.* RAMDHAN. **103 I.C. 209=A.I.R. 1927 Nag. 290.**

—Guardianship—De facto—Release.

———Debt secured by usufructuary mortgage—Property in possession of minor and his *de facto* guardian—Minor not competent to give his assent—Guardian cannot release property. A.I.R. 1918 P.C. 11, Ref. (*Sen and Niamatullah, JJ.*) RAM AUTAR *v.* GHULAM DASTGIR. **115 I.C. 646=51 All. 589=1929 A.L.J. 355=A.I.R. 1929 All. 250.**

—Guardianship—De facto—Rights of alienee.

A *de facto* guardian under Muhammadan Law cannot convey any right or title to immovable property belonging to the ward. Consequently the transferee cannot sue for possession of the properties transferred to him which is in the possession of a trespasser who is equally without title. (*Richardson and Suhrawardi, JJ.*) MONMOHINI DAS GUPTA *v.*

MAHOMEDAN LAW—Guardianship—De facto—Surrender.

BASANTA KUMAR DAS GUPTA. **69 I.C. 753=36 C.L.J. 190=A.I.R. 1922 Cal. 458.**

—Guardianship—De facto—Surrender.

——*Validity.*

A partition at which there is a surrender of a minor's share in certain properties is an alienation and where the minor is represented not by his legal guardian but by a *de facto* guardian only, the whole arrangement falls to the ground nor can the analogy of family settlements common in Hindu families be followed in their case to sustain the arrangement. A.I.R. 1918 P.C., 11; 6 S.L.R. 268; 34 All. 213 (P.C.), Foll.; A.I.R. 1929 Oudh 134, not Appr. (*Rupchand and Wild, A. J.Cs.*) UTTAMCHAND *v.* SAJANDAS. **123 I.C. 698=A.I.R. 1930 Sind 182.**

—Guardianship—De facto—Who is.

Obiter: A *defacto* guardian under Mahomedan Law has no recognised position and is an officious intermeddler. (*Kinkhede, A. J. C.*) NARAYAN *v.* DHARMA. **81 I.C. 273=A.I.R. 1925 Nag. 134.**

—Guardianship—Delegation.

——*Revocability.*

Father is the natural guardian; he cannot divest himself of that duty, or substitute another in his place. His duty is in the nature of a sacred trust. He may in the exercise of his discretion delegate his authority to another, such as a tutor or a schoolmaster or a friend and entrust the education and custody of his children to that other on such terms as he seems fit, but such delegation is revocable.

There is no such thing as adoption among Muhammadans and an arrangement of this kind is clearly revocable. (*Walsh and Pullan, JJ.*) NAZIR KHAN *v.* GANESH. **96 I.C. 617=A.I.R. 1926 All. 687.**

—Joint Family.

Contract Act, S. 65—Sale of ancestral property in Mahomedan minor's hands for satisfying father's debts is not for his benefit.

The ancestral property of a Mahomedan in the hands of a minor is not liable to be attached or sold for the satisfaction of the father's debts and therefore sale of such property made by the guardian during the minority cannot be justified and cannot be said to be for minor's benefit. Therefore no equitable relief by way of refund can be granted to the vendees, 4 P. R. 1913 (F.B.), Appl.; Civil Appeal No. 1884 of 1921, Expl. and Dist. (*Bhide, J.*) KHAIR DIN *v.* SHAH MUHAMMAD. **117 IC. 371=A.I.R 1929 Lah 331.**

——*Manager of joint property acquiring new property in his own name—Such property cannot be joint unless there is an agreement between himself and other co-owners.*

A Sunni Mahomedan died leaving three sons and one daughter. The eldest son continued to manage the joint property and his name was recorded in the Record-of-Rights as the manager of joint property. Subsequently he acquired new property in his own name and in the name of his son. All the members of the family lived and messed together. The manager died leaving his one brother, sister and sons.

Held: that in order to succeed in getting a share of the properties subsequently acquired by the manager in his own name it was incumbent on the other co-owners to have averred and strictly proved that new properties were acquired and possessed by the manager either under an express or implied agreement on behalf of himself and other co-heirs and that he had agreed to account for them in respect thereof. The mere fact that the parties lived and messed together was not a necessary evidence of such implied agreement as in Hindu Law. 38 Mad. 1099 and

MAHOMEDAN LAW—Joint Family.

A. I. R. 1922 Sind 41, Ref. (*Rupchand and Barlee, A. J. Cs.*) ABDUL RAHMAN *v.* HAJI MD. IDRIS. **118 I.C. 207=23 S.L.R. 461=A.I.R. 1929 Sind 212.**

——*Principles of Hindu Law—Not applicable.*

It is not proper to apply the principles governing the Hindu joint family system to a Mahomedan family. Children in a Mahomedan family are not co-owners in the sense that what is purchased by one person enures for the benefit of another, and the fact that the property was purchased with money taken from the father's estate would not make the property the common property of the family. The family would be entitled to debit the amount so taken when accounts would be taken. (*Devadoss, J.*) ABDUL HUCK *v.* NARAYAN NAIDU. **106 I.C. 76=39 M. L. T. 506=A.I.R. 1928 Mad. 14.**

——*There is no such thing as family trading partnership.*

Under Mahomedan Law, there is no such thing as a family trading partnership as under Hindu Law and any partnership transaction between two Mahomedan brothers must be governed by the contract between the parties as regards the partnership. Ordinarily the partnership terminates on the death of one of the partners unless there is evidence to the contrary. (*B. B. Ghose and Roy, JJ.*) SOBEMA BIBI *v.* HAFEZ MAHOMED. **104 I.C. 833=54 Cal. 687=A.I.R. 1927 Cal. 836.**

——*Alienation of joint family property.*

There is no difference between Hindu Law coparcenary and Mahomedan law tenancy-in-common in regard to the alienation of joint family property. (*Curgenven, J.*) PAKKIRI MAHOMED ROWTHER *v.* BAVA MOIDEEN. **98 I.C. 790=1926 M.W.N. 919=A.I.R. 1927 Mad. 82.**

——*Doctrine of ordinary law of occupation applies though that of joint family does not.*

Although the doctrine of joint family does not apply to a Muhammadan family, that does not prevent the ordinary law of occupation applying to it. (*Greaves and Mukerji. JJ.*) SOURAB BIBI *v.* ABBAS ALI BISWAS. **91 I.C. 725=A.I.R. 1926 Cal. 480.**

——*Debt incurred by one member cannot bind others.*

Where a member of a Muhammadan family borrows money on his credit, the other members of the family cannot be held liable merely because they also enjoyed the benefit of the money. (*Greaves and Chakravarty, JJ.*) FATIMA BIBI *v.* RADHA SYAM SAHA. **87 I.C. 660=A.I.R. 1926 Cal. 343.**

——*Acquisition of several co-sharers.*

There is no provision in Muhammadan Law that the acquisitions of the several members are made for the benefit of the joint family. A co-tenant is not a trustee for another co-tenant. 8 Cal. 826; 33 C.L.J. 369; (1897) A. C. 180, Foll. (*Odgers, J.*) ABDUL SAMAD KHAN *v.* BIBIJAN. **91 I.C. 618=1925 M.W.N. 543=A.I.R. 1925 Mad. 1149=49 M.L.J. 675.**

——*Ancestral and self-acquired property—Distinction.*

The Mahomedan Law does not recognise any distinction between ancestral and self-acquired property. (*Kendal and Pullan, A. J. Cs.*) (RANI) ABADI BEGAM *v.* MIRZA AHMAD MIRZA BEG. **82 I.C. 691=11 O.L.J. 757=A.I.R. 1925 Oudh 190.**

——*Representation of family.*

In Mahomedan Law there is no representation of the family as under the Hindu Law. (*Mookerjee and Suhrawardy, JJ.*) LAKSHAN CHANDRA MANDAL *v.*

MAHOMEDAN LAW—Joint family.

TAKIM DHALI. **80 I.C. 357=39 C.L.J. 90=28 C.W.N. 1033=A.I.R. 1924 Cal. 558.**

———*Members living together—Purchase by one in his own name—Presumption.*

Where the uncle and nephew lived together and land was purchased by the uncle in his name, the presumption is that the purchase was made by him exclusively, and the burden is on the nephew to show that he supplied part of the purchase money. The presumption of Hindu Law that the money came from the joint funds is not applicable to Mahomedans. (*Walmsley and Ghose, JJ.*) MOHABBAT ALI *v.* TOFAR ALI. **76 I.C. 481=A.I.R. 1923 Cal. 369.**

———*There is no joint holding under Muhammadan Law.*

Joint family is not an institution of Muhammadans governed by Muhammadan Law and there is no joint holding after the death of the proprietor. Further it cannot be presumed that the male relations hold as managers of an admittedly joint family. Each sharer becomes entitled on the proprietor's death to a share, and limitation runs against each for the recovery of his share, from that day. (*Scott-Smith and Fforde, JJ.*) MT. ZANIAB *v.* GHULAM RASUL. **73 I.C. 425=4 Lah. 402=A.I.R. 1923 Lah. 519.**

———Members living in commensality—Acquisitions of several members are not presumed as under Hindu Law to be for the benefit of joint family. (*Mukerjee and Buckland, JJ.*) KRISHNAJIBAN SANYAL *v.* MD. MASIUDDIN MANDAL. **63 I.C. 244=33 C.L.J. 369=A.I.R. 1921 Cal. 653.**

—Legitimacy—Acknowledgment.

———*Presumption of marriage and legitimacy.*

An ackowledgment which involves the assertion that the father was married to an acknowledgee's mother undoubtedly raises a presumption in favour of the marriage and of the legitimacy. (*Lord Shaw.*) MOHABBAT ALI KHAN *v.* MD. IBRAHIM KHAN. **117 I.C. 17=1929 A.L.J. 465=33 C.W.N. 645=31 Bom. L.R. 846=6 O.W.N. 517=56 I.A. 201=50 C.L.J. 89=30 M.L.W. 97=1929 M.W.N. 676=10 Lah. 725=31 P.L.R. 1=A.I.R. 1929 P.C. 135=57 M.L.J. 366. (P.C.)**

———*Position of acknowledged son regarding onus of proof explained.*

A claimant son who has in his favour a good acknowledgment of legitimacy is in this position : the marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment the onus is on those who deny a marriage to negative it in fact. A. I. R. 1922 P. C. 159, Foll. (*Lord Shaw.*) MOHABBAT ALI KHAN *v.* MD. IBRAHIM KHAN. **117 I.C. 17=1929 A.L.J. 465=33 C.W.N. 645=31 Bom. L.R. 846=6 O.W.N. 517=56 I.A. 201=50 C.L.J. 89=30 M.L.W. 97=1929 M.W.N. 676=10 Lah. 725=31 P.L.R. 1=A.I.R. 1929 P.C. 135=57 M.L.J. 366. (P.C.)**

———*Presumption and rebutting evidence.*

A declaration by a person that another person is his legitimate son born of his loins and in the womb of his married wife is an acknowledgment not merely of sonship but of legitimate sonship. And if direct evidence of marriage is adduced and the Court disbelieves it, the effect of presumption arising from the acknowledgment is not lost and the failure does not absolve the opposite party from disproving or proving the impossibility of marriage and thereby rebutting the presumption. A. I. R. 1922 P. C. 159; A. I. R. 1916 P. C. 27; A.I.R. 1918 P. C. 11, Foll.; 10 C.L.R. 293, Ref. (*Mukerji and Mitter, JJ.*) AHASANULLAH

MAHOMEDAN LAW—Legitimacy—Acknowledgment.

v. NEJABATALI. **A. I. R. 1929 Cal. 682.**

———*Woman livigng with another man without being divorced by her husband—Acknowledgment cannot make children from such man legitimate.*

Where it is not proved that a woman was divorced by her husband when she started living with another man, and also that she ever married him, it is impossible to draw the inference from any acknowledgment of the latter that children from such man are legitimate or that the invalid marriage took place. 15 All. 396 and 26 M. L. J. 260, Appl. (*Dalip Singh, J.*) MUBARAK ALI *v.* SAHIB JAN. **117 I. C. 376=A. I. R. 1929 Lah. 372.**

———*Acknowledgment cannot make an illegitimate son legitimate.*

Under Mahomedan law, no statement made by a man that another, proved to be illegitimate, is his son, can make that other legitimate. A. I. R. 1922 P. C. 159, Foll. ; 10 All. 289 and 32 All. 345, Rel. on. (*Addison and Bhide, JJ.*) FEROZE DIN *v.* NAWAB KHAN. **110 I. C. 258=9 Lah. 581=29 P. L. R. 529=A.I. R. 1929 Lah. 55.**

———*Bringing up a boy is not acknowledgment of sonship.*

Acknowledgment of sonship is sufficient under Mahomedan Law to establish paternity and legitimacy, but there must be a definite acknowledgment of sonship, *i. e.*, the father must acknowledge the boy as the son of his body. For a man to say that he has brought up a boy is not an acknowledgment of sonship or paternity and is, in fact, rather the reverse : it contradicts the physical relation of father and son and instead asserts that the man has brought up some other boy as his son. Neither under Mahomedan Law nor any other law will such a statement prove paternity or legitimacy, 15 N.L.R. 1, Ref. (*Staples and Mohiuddin, A. J. Cs.*) ABDUL RAHIMAN *v.* ABDUL HAFIZ. **121 I.C. 35=A.I.R. 1929 Nag. 313.**

———*Presumption.*

Acknowledgment raises a presumption of marriage, but the presumption is capable of being set aside by contrary proof. Marriage will be held proved and legitimacy established, unless the marriage is disproved, A.I.R. 1922 P. C. 159 and 32 All. 345, Foll. (Case law considered.) (*Addison and Johnstone, JJ.*) FEROZE DIN *v.* NAWAB KHAN. **112 I.C. 89=9 Lah. 224=30 P.L.R. 154=A.I.R. 1928 Lah. 432.**

———*Presumption of paternity—Rebutting evidence—Nature of.*

According to Mahomedan law, if a man has acknowledged another as his legitimate child, the presumption of paternity arising therefrom can only be rebutted by disclaimer on the part of the person acknowledged, or such proximity of age as would render the alleged relationship physically impossible, or proof that the acknowledgee is in fact the child of some other person. (*Dawson Miller, C. J. and Mullick, J.*) MT. BIBI FATMA *v.* ABDUL KARIM. **110 I.C. 428=A.I.R. 19 28 Pat. 539**

———Even if there is no definite evidence of valid marriage between the parties, acknowledgment by father is sufficient to make the issues legitimate. A.I.R. 1922 P. C. 159 ; 46 Cal. 259 and A.I.R. 1916 P.C. 27, Foll. (*Ross and Kulwant Sahay, JJ.*) IHSAN HASSAN *v.* PANNALAL. **103 I.C. 430=7 Pat. 6=A.I.R. 1928 Pat 19.**

———*Scope and extent of presumption.*

In the proper sense there is no legitimation under the Muhammadan law. Under that law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave. Any other offspring is

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the offspring of *zina*, that is, illicit connection and cannot be legitimate. The term 'wife' necessarily connotes marriage, but as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available but if there be no such, indirect proof may suffice. An acknowledgment of legitimacy in favour of a son is one way of indirect proof. This acknowledgment must be not merely of sonship but must be made in such a way that it shows that the acknowledgor meant to accept the other not only as his son, but as his legitimate son. It must not be impossible on the face of it, *i.e.*, it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when mother spoken to in acknowlegment being the wife of another or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, the acknowledgment has more than a mere evidential value. It raises a presumption of marriage—a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being however, a presumption of fact and not *Juris et de jure*, it is like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant-son who has in his favour a good acknowledgment of legitimacy is in this position. The marriage will be held proved and his legitimacy established unless the marriage is disproved. Unless the claimant establishes his acknowledgment, the onus is on him to prove a marriage. Once he establishes an acknowledgment the onus is on those who deny a marriage to negative it in fact .(*Wazir Hasan and Gokaran Nath Misra, JJ.*) AGA MOHAMMED IBU ALI *v.* ZOHRA BEGAM. **105 I.C. 490=1 L.C. 549=A.I.R. 1927 Oudh 562.**

——*Onus of proof.*

Mahomedan Law does not recognize the legitimation or the adoption of a son as under the Hindu Law. It only permits of proof of legitimacy by indirect evidence where direct evidence of marriage is wanting. Admission by the acknowledgor that the acknowledgee was his "son" may, under certain circumstances, raise the twofold presumption that the acknowledgee was the legitimate son of the acknowledgor and that the mother of the acknowledgee was the wedded wife of the acknowledgor.

The onus of proof is in the first instance upon the person setting up the acknowledgment to prove that the expression "son" was used as meaning a legitimate son and that it was used, not casually, but with the intention of conferring legitimacy. It is only when that burden is discharged that the twofold presumption arises, which the other side is called upon to rebut.

The presumption may be taken advantage of either by a wife-claimant or a son-claimant. A.I.R. 1922 P.C. 159, Rel. on. A.I.R. 1916 P.C. 27,Dist. Continued co-habitation as husband and wife plus birth after such co-habitation and treatment tantamount to acknowledgment, raises a *prima facie* presumption of legitimacy, but the same presumption would not arise where the mother of the acknowledgee admittedly started life with the father as his concubine. 11 M.I.A. 94, (P.C.) Ref. (*Rupchand Bilaram and Lobo, A. J. Cs.*) MT. HAKIMA *v.* MT. JIANDI. **103 I.C. 870=A.I.R. 1927 Sind 209.**

——*When allowed.*

It is only when direct proof of marriage is not available that indirect proof of marriage by way of

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acknowledgment of legitimacy in favour of a son is allowed to take the place of direct proof of marriage. Where direct proof is available to establish that marriage was impossible or a marriage would be invalid, no question of presumption of marriage on account of an alleged acknowledgment can arise. A. I. R. 1922 P. C. 159 ; 10 All. 289, Foll. (*Mears, C. J. and Muker ji, J.*) MD. SHAFEE ULLAKHAN *v.* NUHULLAH KHAN. **88 I.C. 954=48 All. 58=23 A.L.J. 917=6 L.R.A. Civ. 505=A.I.R. 1926 All. 48.**

——*Acknowledgment by father is* prima facie *but rebuttable evidence of legitimacy.*

A declaration as to legitimacy of a person made by his alleged father raises a presumption of marriage, which may be taken advantage of by either a wife-claimant or a son-claimant. Being however a presumption of fact, it is capable of being set aside by contrary proof. The claimant-son who has in his favour a good acknowledgment of legitimacy is in this position.

The marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgment the onus is on him to prove the marriage. Once he establishes the acknowledgment, the onus is on those who deny the marriage to negative it in fact. But the declaration can be rendered useless by the impossibility of marriage between the alleged father and the mother of the claimant. (*Dalal, J.C.*) ZAHID ALI *v.* MT. SHAHR BANU. **86 I.C. 101=12 O.L.J. 130=2 O.W.N. 10=A.I.R. 1925 Oudh 384.**

——*Finding that valid marriage not possible—Doctrine of acknowledgment does not apply.*

Unless there is an absolute bar or impediment to a valid marriage, acknowledgment has the effect of the legitimation according to Muhammadan Law where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty. But where there is clearly the finding of fact that there could not have been a valid marriage between the parties the question of acknowledgment as proof of marriage does not at all arise. 9 C.W.N. 352, Dist.; 1922 P.C. 159; 10 A 289;—15 A. 396 Ref. (*Ross, J.*) MAN MOHAN SAW *v.* MUHAMMAD HUSAIN KHAN. **72 I.C. 152=1 Pat. L.R. Civ. 328=A.I.R. 1924 Pat. 191.**

——*Principle discussed.*

Legitimacy is a status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. In the proper sense there is no legitimation under the Mohamedan Law. Bythe Mohamedan Law a son be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of *zina*, that is, illicit connection, and cannot be legitimate, The term "wife" necessarily connotes marriage; but, as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but must be made in such a way that it shows that the acknowledgor meant to accept the other not only as his son but as his legitimate son. It must not be impossible upon the face of it. The acknowledgment may be repudiated by the acknowledgee. But if no objections occur, then the acknowledgment has more than a mere evidential

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value. It raises a presumption of marriage—a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not *juris et de jure*, it is, like every other presumption of fact, capable of being set aside by contrary proof.

Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact. (*Lord Dunedin.*) SYED HABIKUR RAHIMAN CHOWADHURY *v.* SYED ALTAFALI CHOWADHURY. **60 I.C. 837=26 C.W.N. 81=48 I.A. 114=48 Cal. 856=19 A.L.J. 414=23 Bom.L.R. 636=33 C.L.J. 479=14 M.L.W. 175= 1921 M.W.N. 366=A.I.R. 1922 P.C. 159=40 M.L.J. 510. (P.C.)**

——*Marriage disproved—Acknowledgment cannot legitimate offspring.*

The acknowledgment by a Muslim of his offspring is sufficient under Muhammadan law to legitimate him provided that certain conditions are satisfied, the chief among which is that the marriage should not have been disproved. The rule of recognition permitted by Muhammadan Law applies only when the alleged marriage is uncetain, that is, not proved, and cannot apply when it is found as a fact that it did not take place. (*Le Rossignol and Harrison, JJ.*) HUSSAIN BAKHSH *v.* JHANDA SINGH. **68 I.C. 749=A.I.R. 1922 Lah. 460.**

——*Presumption—Scope of.*

Acknowledgment by a Mahomedan father creates a presumption of legitimacy but an acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty. Where however there is clear evidence that no marriage ever took place, the presumption has no place. 10 A. 289; 11 M.I.A. 94; 21 C. 966. Ref. (*Broadway, J.*) ABDUL AZIZ *v.* MT. AMEER BEGAM. **66 I.C. 404 (Lah.).**

——*Onus of proof.*

Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact. (*Lord Dunedin,.*) SYED HABIKUR RAHMAN CHOWADHURY *v.* SYED ALTAFALI CHOWADHURY. **60 I.C. 837=26 C.W.N. 81=48 I.A. 114=48 Cal. 856=19 A.L.J. 414=23 Bom. L.R. 636=33 C.L.J. 479=14 M.L.W. 175=1921 M.W.N. 366=A.I.R. 1922 P.C. 159=40 M.L.J. 510 (P.C.)**

——*Marriage possible—Husband acknowledging the wife's status—Effect.*

Acknowledgment by a Mahomedan that a certain woman is his married wife, invests the woman with the status of married wife and makes her children legitimate unless the marriage between the parties is legally impossible. (*Stuart and Pandit Kanhaiya-Lal, A. J. Cs.*) MUHAMMAD ALI KHAN *v.* GHAZAUFOR ALI KHAN. **69 I.C. 141=7 O.L.J. 474.**

—Legitimacy—Burden of proof—

——*Maximum period of gestation—Abnormal circumstances must be proved by party alleging them*

It is obvious that the varying maximum periods of pregnancy, given in books of medical jurisprudence, and the maximum period fixed by Muhammadan Law, relate to abnormal cases, and in each case it is for the plaintiff who alleges that there were abnormal circumstances attending his birth, to show that they existed. (*Shadi Lal, C.J. and Abdul Qadir, J.*) UMAR HAYAT *v.* MISRI KHAN. **69 I.C. 491=A.I.R. 1924 Lah. 177.**

MAHOMEDAN LAW—Maintenance—Legitimacy—Presumption.

——*Children born to woman married to another—No presumption of legitimacy or marriage arises.*

Where it is found that certain children were by a woman who was at the time proved to have been married to another, no rules of presumption of legitimacy or marriage can avail the children who must be held to be illegitimate. (*Lord Carson.*) NUH-ULLAH *v.* MD. SHAFIQ-ULLAH KHAN. **117 I.C. 6=30 M.L.W. 596=33 C.W.N. 900=1929 M.W.N. 459=A.I.R. 1929 P.C. 212=57 M.L.J. 522 (P. C.)**

———Daughter of a woman by the same man got dowry exactly the same as by admittedly legitimate daughter strengthen presumption. (*Mukerji and Mitter, JJ.*) AHASANULLA *v.* NEJABATALI. **A.I.R. 1929 Cal. 682.**

——*Legitimacy is presumed from residence and maintenance.*

Muhammadan law raises a strong presumption in favour of legitimacy where a child was born under a man's roof and continued to be maintained in his house without any steps being taken on the father's part to repudiate his title to legitimacy as his offspring. (*Dalal and Simpson, A. J. Cs.*) GALSTAUN *v.* MIRZA ABID HUSAIN. **73 I.C. 428=10 O.L.J. 263=A.I.R. 1924 Oudh 19.**

—Legitimacy—Proof of.

——*Period of gestation.*

The rule of Mahomedan Law regarding gestation is a rule of evidence within the meaning of S. 2, Evidence Act and the Courts are not bound by the rule of Mahomedan Law in this respect. To such case S. 112, Evidence Act, applies. 76 P. R. 1891 and A. I. R. 1923 All. 570, Rel. on. (*Johnstone, J.*) MT. RAHIM BIBI *v.* CHIRAGH DIN. **120 I.C. 495=A.I.R. 1930 Lah. 97.**

———In disproof of legitimacy no better class of evidence can be produced than the evidence by near relatives of the parties concerned. (*Lord Carson.*) NUH-ULLAH *v.* MD. SHAFIQ-ULLAH KHAN. **117 I.C. 6=33 C.W.N. 900=1929 M.W.N. 459=30 M.L.W. 596=A.I.R. 1929 P.C. 212=57 M.L.J. 522. (P. C.**

———S. 112 of Evidence Act applies to determine legitimacy of Mahomedan children.

Where a Mahomedan child was born during the continuance of a valid marriage between its parents but its birth was within six months of the date of its parents' marriage,

Held, that S. 112 applied and the child was legitimate, 10 All. 289, Ref.; A.I.R. 1923 All. 570, Appr. (*Daniels and King, JJ.*) SIBT MAHOMED *v.* MAHOMED HAMEED. **96 I.C. 582=48 All. 625=24 A.L.J. 723=A.I.R. 1926 All. 589.**

——*Proof of adultery—Effect.*

Where it was found that the plaintiff was born 331 days or eleven full months after his alleged father's death and that his mother had been living forthe previous few years in illicit connection with another person.

Held, that the plaintiff-appellant was not the legitimate son of the alleged father. (*Daniels, J.*) FATTEH DIN *v.* UMRAO. **82 I.C. 592=A.I.R. 1923 All. 440.**

—Life Estate—Creation of.

——*Shiah Law.*

The power of a Shiah in creating a limited interest is not restricted to a particular kind of property, such as house, but extends to lands as well. (*Wazir Hasan, A. J. C.*) SIRIJ HUSAIN *v.* MUSHAF HUSAIN. **65 I.C. 132=9 O.L.J. 149=24 O.C. 321=A.I.R. 1922 Oudh 93.**

—Maintenance.

——*Wife—Hanafi Law—Maintenance to wife.*

MAHOMEDAN LAW—Maintenance.

The husband is not under Hanafi law liable for the maintenance of his wife where there is no decree or agreement for maintenance before suit : 6 Cal. 631 and 41 Mad. 211, Rel. on. (*Anantakrishna Ayyar, J.*) MANDY MATHAR SAIB *v.* BIJAN BI. **121 I.C. 846 = A.I.R. 1930 Mad. 234.**

——*Hanafi Law—No arrears of maintenance can be claimed.*

Under the Hanafi system of law, the wife is not entitled to arrears of maintenance against the husband in the absence of a specific agreement or decree. (*Anantakrishna Ayyar, J.*) MANDY MATHAR SAHIB *v.* BIJAN BI. **121 I.C. 846 = A.I.R. 1930 Mad. 234.**

——*Wife cannot pledge credit of her husband.*

There is no provision of Mahomedan Law allowing the wife unconditionally to pledge her Hanafi husband's credit to secure money for maintenance where the husband deserts his wife. (*Anantakrishna Ayyar, J.*) MANDY MATHAR SAHIB *v.* BIJAN BI. **121 I.C. 846 = A.I.R. 1930 Mad. 234.**

——*Wife leaving her husband for no justifiable reason—Decree for future maintenance cannot be passed.*

Where the Court finds the wife though ill-treated to some extent, it was long ago when she was a child and the huband is not guilty of such cruelty as to justify his wife in her refusal to live with him, she being a grown up woman, the Court should not give her a decree for future maintenance. (*Barlee, A.J.C.*) MT. ISMABAI *v.* UMAR MAHOMED SIDIK. **A.I.R. 1930 Sind 11.**

In Mahomedan Law arrears of maintenance cannot be decreed : 6 Cal. 631, Foll. (*Barlee, A. J. C.*) MT. ISMABAI *v.* UMAR MAHOMED SIDIK. **A.I.R. 1930 Sind 11.**

——*Divorced wife—Right of.*

A who was married to *B* applied under S. 488, Criminal P. C., for maintenance. B proceeded to divorce her before Court. The question arose as to whether *A* could be granted maintenance and for what period.

Held, that *A* could obtain maintenance against *B* during the period of iddat and was entitled to it for three months : 5 All. 226 and 19 All. 50, Rel. on.; 17 O.C. 260, DIST. (*Stuart, C. J.*) MT. MARIAM *v.* KADI BAKSH. **6 O.W.N. 942 = 1929 Cr. C. 625 = A.I.R. 1929 Oudh 527.**

——*Grant of—Construction.*

Where maintenance grant is a transfer of the right to the usufruct ; it is a transaction of ariat and not of a gift under the Mahomedan Law. 28 All. 264 ; 30 All. 309 Rel. on (1925) 2 O. W. N. 83; 28 O. C. 265 ; 87 I.C. 445 (2); A.I.R. 1925 Oudh 568, Ref. to. (*Hasan and Misra, JJ.*) MOHAMMAD SIDDIQUE KHAN *v.* RISALDAR KHAN. **3 O.W.N. 447 = 95 I.C. 220 = 2 Luck 216 = A.I.R. 1926 Oudh 360.**

—Marriage—

Age of puberty.
Allowance on separation.
Anti-nuptial agreement.
Apostacy.
Breach of Contract.
Ceremonies.
Consent of Bride.
Dissolution.
Formalities.
Grounds for dissolution.
Judicial Separation.
Kharch-i-pandan.
Option of puberty.
Presumption.

MAHOMEDAN LAW—Marriage—Allowance on separation.

Proof of.
Repudiation.
Restitution of Conjugal rights.
Settlement.
Validity.

—Marriage—Age of Puberty—

——*Shia Law.*

In the case of Shias the age of puberty begins with menstruation and the presumption is that menstruation takes place between the age of nine and ten years: 26 W. R. Civil Rulings 26 (P. C.), Ref. (*Lindsay and Banerji, JJ.*) SIBH AHMAD *v.* AMINI KHATOON. **113 I.C. 434 = 26 A.L.J. 705 = 50 All. 733 = A.I.R. 1929 All. 18.**

——*Shia Law—Conflicting authorities as to age of consent.*

In the Shia Law of marriage, the authorities are conflicting as to the age of consent for the girl and the attainment of puberty is the test for her having reached the age of majority for consenting to her marriage. (*Mukerji, J.*) MT. ZAITUN *v.* SHAIK KOMMAL. **79 I.C. 907 = 22 A.L.J. 423 = 5 L.R.A. Civ. 296 = A.I.R. 1924 All. 870.**

——*Law as to unaffected by Majority Act IX of* 1875.

The Muhammadan Law of marriage is left entirely untouched by the provisions of the Majority Act. Minority under the Muhammadan Law terminates on completion of the fifteenth year and every Muhammadan of sound mind who has attained puberty may enter into a contract of marriage even if he or she is a minor according to the provisions of the Indian Majority Act. (*Moti Sagar, J.*) MT. BEGAM BIBI *v.* RAHMAT KHAN. **75 I.C. 892 = A.I.R. 1924 Lah. 673.**

——*Age of Majority for purposes of.*

Under the Muhammadan Law, the age of majority for giving a minor girl in marriage is 15 years. A boy aged 15 is therefore competent to give his sister in marriage, as her guardian. (*Martineau, J.*) YUSUF *v* MT. ZAINABH. **68 I.C. 727 = A.I.R. 1923 Lah. 102.**

—Marriage—Allowance on Separation.

——*Validity.*

There is no reason why a stipulation by a Mahomedan husband to make an allowance to his wife in case of separation should be deemed to offend against the rule of public policy : 37 Bom. 280, Diss. from. A.I.R. 1928 Oudh 303 and A.I.R. 1921 All. 152, Rel. on. (*Shadi Lal, C. J. and Hilton, J.*) MD. ALI AKBAR *v.* FATIMA BEGAM. **119 I.C. 486 = 30 P.L.R. 498 = 11 Lah. 85 = A.I.R. 1929 Lah. 660.**

——*Agreement to provide separate maintenance to first wife on second marriage—Validity.*

If a Mahomedan marries a second wife and finds that his first wife cannot pull on well with his second wife and if he does not or cannot provide a separate apartment or habitation for her exclusive use, and for the sake of preservation of the family peace executes an agreement in her favour giving her maintenance, even if she does not reside in the same house with him and second wife, that agreement is not against public policy. This arrangement does not necessarily result in separation between husband and wife. The husband may conveniently manage to visit her in the house which she occupies after leaving his house. By occupying another house she does not necessarily refuse "herself" to her husband: 37 Bom. 280, Dist. (*Raza and Nanavutty, JJ.*) MANSUR *v.* MT. AZIZUL. **109 I.C. 892 = 3 Luck. 603 = 5 O.W.N. 475 = A.I.R. 1928 Oudh 303.**

MAHOMEDAN LAW—Allowance on separation.

———*Restitution suit—Compromise in suit that wife should live separate and receive maintenance if ill-treated, is valid.*

An agreement for future separation between a Mohammadan husband and wife is void. But the agreement and a compromise thereon in a suit for restitution by husband that the wife should live separate and receive maintenance, if the husband maltreats her are valid ; and the wife's giving giving up of her defences in the restitution suit is sufficient consideration for the compromise. (*Simpson, A.J.C.*) BANNEY SAHEB *v.* ABIDA BEGAM. **69 I.C. 778=26 O.C. 157= 10 O.L.J. 13=A.I.R. 1922 Oudh 231.**

—Marriage—Anti-nuptial agreement.

———*Anti-nuptial agreement to live with wife at her father's house is invalid.*

Any agreement which binds the husband to live with his wife at her father's house is invalid and cannot constitute a defence to a suit for restitution of conjugal rights : 18 C.W.N. 693 ; 32 I.C. 707 ; 1 Lah. 597 ; and 6 Bom. L. R. 728 Foll.; 8 Cal. 327 Dist. 17 Cal. 670, Appr. (*Walsh, J.*) KHATUN BIBI *v.* RAJJAB. **94 I.C. 224=A.I.R. 1926 All. 615.**

———*Agreement for divorce.*

An anti-nuptial agreement provided among other things. "I (the husband) accordingly agree that if I forsake the Malak-o-Badar community or am expelled from it by its spiritual head my wife may get a divorce from me pronounced by a person appointed by her on my behalf which divorce I will accept as valid."

Held, that the condition is not void as being opposed to the principles or policy of the Muhammadan Law, as that Code treats marriage as a purely civil contract. Ameer Ali's Muhammadan Law, Vol. II, p. 369, Ref. (*Hallifax, A. J. C.*) FIDA ALI *v.* SANAI BADAR. **73 I.C. 1042=6 N.L.J. 166= A.I.R. 1923 Nag. 262.**

———*Agreement for paying certain sum as maintenance in case of dissensions.*

An anti-nuptial agreement made between a lady and her prospective husband and her prospective father-in-law, providing for the payment of a certain maintenance in the event of future dissensions between her and her prospective husband, is good in law and enforceable after her divorce, where the agreement is obtained to secure the wife against ill-treatment and to ensure for her a suitable amount of maintenance in case such treatment is meted out to her. 37 Bom. 280, Dist. (*Lindsay and Kanhaiya Lal, JJ.*) MUHAMMAD MUIN-UD-DIN *v.* JAMAL FATIMA. **63 I.C. 883=43 All. 650= 19 A.L.J. 675=A.I.R. 1921 All. 152.**

———*Agreement to stay with wife's parents.*

An agreement by the husband to live with his wife in her parents' house is invalid and the wife cannot put it as a defence in a suit by the husband for restitution of conjugal right and if she is proved to have left her father's house and went to live with the husband she is deemed to have waived the right if any under such agreement. (*Broadway and Abdul Raoof, JJ.*) FATIMA BIBI *v.* NUR MAHOMED. **60 I.C. 88= 1 Lah. 597.**

—Marriage—Apostacy.

———*Burmese Buddhist woman cannot marry a Shia unless converted to Islam.*

Unless a Burmese Buddhist woman is converted to the faith of Islam prior to her marriage, no marriage can be contracted between her and a Shia Mussalman. (*Rutledge, C.J. and Brown, J.*) OFFICIAL ASSIGNEE *v.* MA HLA HTWE. **117 I.C. 561=A.I.R. 1929 Rang. 35.**

MAHOMEDAN LAW—Marriage—Apostacy.

———*Person renouncing Islam and converting into Christianity—Marriage under Mahomedan law is dissolved.*

Where a person who has formally renounced faith in Islam and has gone through the rites of baptizm, marriage under the Mahomedan law is dissolved by the formal recognition of admission into Christianity. In a suit for restitution of conjugal rights it is immaterial whether motive of conversion is genuine or a device to have the marriage dissolved. (*Dalip Singh, J.*) MT. RAHMATE *v.* NIKKA. **111 I.C. 160= 29 P.L.R. 570=A.I.R. 1928 Lah. 954.**

———*Mahomedan marriage with a Hindu Girl—Validity.*

Under the Mahomedan law, a Mahomedan may contract a valid marriage with a Mahomedan woman or with a kitabia, *i. e.*, a Christian or a Jewess but not with an idolatress or a fire-worshipper, but if he does marry an idolatress or a fire-worshipper, the marriage is not void (batil) but merely invalid (fasid). Where therefore a Mahomedan marries a girl, originally a Hindu, in the absence of proof that she had already been married and her husband was living at that time, her marriage with the Mahomedan will not be void but merely invalid and the offspring of such marriage will not be illegitimate but legitimate issues of their father. (*Ross and Kulwant Sahay, JJ.*) IHSAN HASSAN KHAN *v.* PANNA LAL. **103 I.C. 430= 7 Pat. 6=A.I.R. 1928 Pat. 19.**

———*Hindu married woman adopting Islam—Subsequent marriage with Mahommedan is illegal unless first marriage is dissolved through Court.*

Where a Hindu married woman embraces Islam and marries a Mahommedan the mere fact of her changing her religion though *bona fide* does not *ipso facto* dissolve her previous marriage. Though she must be deemed to be governed by the Mahommedan Law after conversion, yet even under that law a convert's first marriage is not dissolved automatically. It is only where the conversion takes place in a country where the Mahommedan Law is not administered that the marriage is so dissolved on the lapse of the woman's term of probation. But when she remains in a country where the Mahommedan Law regarding questions of marriage is in force she has only the right to obtain a divorce after her husband has refused to embrace Islam. The marriage is not dissolved but a separation amounting to a legal divorce can be effected through Court. If such dissolution is obtained, even if the marriage with the Mahommedan took place within a few days of her running away from her husband *i. e.*, before the expiry of her period of probation, the haste would have been a mere irregularity which would be perfectly cured by long continued co-habitation and treatment as a wife. But in the absence of such authorised and legal dissolution the original marriage tie cannot be severed. Her going through a form of marriage a second time cannot make this second performance a valid marriage. No question of doctrine of *factum valet* would arise in a case where a woman's husband is still alive. The second marriage is not only irregular but illegal and such an illegality cannot be cured either by acquiescence or long continued co-habitation. (*Sulaiman, J.*) MT. MAHTAB-UN-NISSA *v.* RIFAQAT ULLAH. **85 I.C. 459=6 L.R.A. Civ. 145= A.I.R. 1925 All. 474.**

———*Apostacy of either party—Effect on marriage.*

Where a Muhammadan lady was baptised and sued for dissolution.

Held ; that by the apostacy of either the husband

MAHOMEDAN LAW—Marriage—Breach of Contract.

or the wife a Muhammadan marriage is dissolved and that the real question in such cases is not whether she is baptised but whether she has renounced the Muhammadan religion. 124 P. R. 1876 ;-132 P. R. 1884; 61 P. R. 1899-85 P. R. 1906;-33 A. 90;-39 C. 409 Ref. (*Scott Smith, J.*) MT. BAKHO *v.* LAL.

71 I.C. 830=A.I.R. 1924 Lah. 397.

—Marriage—Breach of Contract.

——*Compensation.*

Under the Mahomedan Law in a suit by a plaintiff for damages for breach by the defendant to give his daughter in marriage to the plaintiff, the latter would be entitled only to receive compensation under Section 73 of the Contract Act for any loss or damage caused to him by the breach, which the parties knew would be likely to result from the breach of it. (*Campbell, J.*) GHULAM MUHAMMAD *v.* MEHRAJ DIN. **75 I.C. 746= A.I.R. 1923 Lah. 679.**

—Marriage—Ceremonies

——*Necessity of.*

Held ; Under the *Shia* Law, as in the *Hanafi* Law, if a woman is adult and sane, she is competent to enter into a matrimonial engagement without advice or consent from any body. Under the Shia Law the presence of witnesses is not necessary in any matter regarding marriage. A marriage contracted by the spouses themselves or their guardian in private is valid. The parties therefore, were legally married, and marriage could not be invalidated by the desire of the parties to have a more elaborate ceremony performed later, the ceremony being complete the plaintiff was entitled to claim restitution of conjugal rights. Where in a Shia marriage the essentials are present (the declaration and the acceptance expressed in such a manner as to demonstrate intention without any sort of ambiguity) the presence or the absence of religious ceremonials is immaterial and in no way affects the validity of the union. (*Stuart, J.*) MT. NAFISUNNISA *v.* MIRA MUMTAZ HUSAIN. **66 I.C. 539= A.I.R. 1922 All. 363.**

—Marriage—Consent of bride.

——*Hanafi and Shafi Law—Difference.*

The consent of an adult virgin even among the Shafi sect is essential for the validity of a marriage and the only difference between Hanafi Law and the Shafi Law on this point is that under the Shafi Law the consent must be expressed through a wali and not direct : 1 B. H. C. R. 236, Dist. ; 22 W. R. 403, Ref. (*Odgers and Madhavan Nair, JJ.*) HASAN KUTTY *v.* JAINABHA. **113 I.C. 306=52 Mad. 39= 28 M.L.W. 710=A.I.R. 1928 Mad. 1285= 55 M.L.J. 828.**

——*Father's consent to marriage is not substitute for girl's consent.*

Where the girl has become adult at the time of the nikah, the consent of her father could not take the place of her own consent which under the Shia law is essential for validity of the marriage. (*Lindsay and Banerji, JJ.*) SIBH AHMAD *v.* AMINA KHATOON. **113 I.C. 434=26 A.L.J. 705= 50 All. 733=A.I.R. 1929 All. 18.**

Shia Law—Marriage with consent of girl's grandfather but without her consent, she not having attained puberty at time of marriage—Marriage is valid. (*Mukerji, J.*) MT. ZAITUN *v.* SHEIKH KOMMAL. **79 I.C. 907=22 A.L.J. 423= 5 L.R.A. Civ. 296=A.I.R. 1924 All. 870.**

—Marriage—Dissolution—

——*Kazi's powers.*

The Kazi's powers are to separate persons who cannot contract a legal marriage yet have so married or to declare invalid a marriage which is patently a nullity, or in certain cases to interfere in order to protect the life of the woman. (*Kennedy and Rupchand Bilaram, A.J. Cs.*) HAFIZAN *v.* SAIDINO. **86 I.C. 301=A.I.R. 1925 Sind 22.**

MAHOMEDAN LAW—Marriage—Grounds for dissolution.

—Marriage—Formalities

——*'Muta' Marriage.*

"Muta" is a very vague and unsatisfactory form of contract for personal relations. There must be definite time during which the relationship is to last and definite sum or thing specified as dower. (*Rutledge, C. J. and Brown, J.*) OFFICIAL ASSIGNEE *v.* MA. HLA HTWE. **117 I.C. 561=A.I.R. 1929 Rang. 35.**

——*Mutual offer and acceptance.*

In the case of Mahomedan marriages there should be a mutual offer and acceptance by competent parties. If the girl is a minor, the offer or acceptance at the time of the ceremony may be done by her guardian. If she has reached the age of puberty, her acceptance may be either given by herself or it may be given by her "*waris.*" The authorisation to give acceptance of the offer of marriage must be given in respect of a particular person and should be in express words.

Where the village people went to the place where the girl was and said "who is your *waris*" and thereupon she replied "My father."

Held : that such authorisation was not sufficient. (*Kennedy and Rupchand Bilaram, A. J. Cs.*) HAFIZAN *v.* SAIDINO. **86 I.C. 301= A.I.R. 1925 Sind 22.**

——*Necessity for.*

The Mahomedan law appoints no specific ceremony for the contractual performance of a marriage but according to recognised custom marriages among all the sects are solemnized by a person conversant with the requirements of the law (*i.e.*) the Kazi while two other persons are appointed for the purpose of acting on behalf of the contracting parties with a certain number of witnesses. (*Broadway, J.*) ABDUL AZIZ *v.* MT. AMEER BEGAM. **66 I.C. 404. (Lah.)**

—Marriage—Grounds for dissolution.

——*Accusation of laan by husband.*

Where a wife appeals to a Court of law for dissolution of marriage, on the ground that she has been falsely accused of adultery, by the husband the husband is allowed a *locus penitentiae* before the marriage is dissolved. If he avails himself of this *locus penitentiae* he may be liable for punishment for the slander or defamation but the marriage cannot be dissolved : A.I.R. 1927 All. 56, Foll. (*Gokaran Nath Misra and Shrivastava, JJ.*) MT. FAKHRE JAHAN BEGAM *v.* MD. HAMIDULLAHKHAN. **114 I.C. 314=5 O.W.N. 936=4 Luck. 168= A.I.R. 1929 Oudh 16.**

——*Accusation of laan—Husband admitting but expressing regret—Retraction—Validity.*

A wife sued her husband for dissolution of marriage on the ground of accusation of adultery. The husband from the first moment admitted the accusation made by him and although he tried to explain the circumstances under which he made it, he made no attempts to substantiate it and on the contrary expressed regret for it.

Held: that the retraction was valid : A.I.R. 1927 All. 56, Dist. (*Gokaran Nath Misra and Shrivastava, JJ.*) MT. FAKHRE JAHAN BEGAM *v.* MD. HAMIDULLAH KHAN. **114 I.C. 314=5 O.W.N. 936= 4 Luck 168=A.I.R. 1929 Oudh. 16.**

——*Impotency at time of marriage.*

Under Muhammadan Law a wife cannot obtain a

MAHOMEDAN LAW—Marriage — Grounds for dissolution.

decree for dissolution of marriage on the ground of her husband's impotency unless he is proved to be impotent at the time of marriage. (*Martineau, J.*) FEROZE DIN *v.* MT. WAZIR BEGAM. **91 I.C. 82= 26 P.L.R. 747=A.I.R. 1926 Lah. 218.**

——*Impotency.*

A Mahomedan wife can claim divorce on the ground of impotency of her husband. (*Kanhaiya Lal, J.*) MT. ALTAFAN *v.* IBRAHIM. **75 I.C. 502= 21 A.L.J. 811=4 L.R.A. (Civ.) 561= A.I.R. 1924 All. 116.**

——*Dissolution on the ground of impotency—Procedure.*

An impotent person is defined by the Mahomedan Law as one who is unable to have connection with a woman, though he has the natural organs; and a person who is able to have connection with an enjoyed woman, but not with a virgin, or with some women but not with others, whether the disability be by reason of disease or weakness, or original constitution, or advanced age, or enchantment, is still to be accounted impotent with respect to her with whom he cannot have connection, (Baillie's Mahommedan Law Vol. I, p. 347, Ref.) The Mahommedan Law provides that where such is the case and a woman brings her husband before a Judge, and sues him, demanding a separation on the ground of impotency, and the fact whether the woman is an enjoyed woman or a virgin is disputed, the case is to be adjourned for a year, and if after the expiry of that year the woman should allege that she is still a virgin, an inspection by women is to be ordered, and if they should declare her to be an enjoyed woman, the word of her husband is to be taken with his oath; but if they should declare her to be a virgin, her word as to non-intercourse is to be received without oath. The intention obviously is that if such a claim is brought by a wife and is contested, an opportunity should be given to the husband to show that the charge against him is unfounded or that the alleged incapacity is removeable; and the woman should be required to appear again after a year before the judge in order to establish her claim to the relief she asks for (*Ibid* p. 348). If the husband should consummate the marriage in the interval, the petition of the wife requires to be dismissed after the lapse of the period fixed by the judge. If he, however, fail in his marital obligation, the wife is entitled to a divorce (Ameer Ali's Mahommedan Law Vol. II, p. 598 and Tyabji's Mahomedan Law, Vol. II, p. 251 Ref. See also 21 B. 77.) But the wife must allow full access to her husband at all reasonable times whether she is living in the house of her parents or elsewhere during the year. (*Kanhaiya Lal, J.*) MT. ALTAFAN *v.* IBRAHIM. **75 I.C. 502= 21 A.L.J. 811=4 L.R.A. Civ. 561= A.I.R. 1924 All. 116.**

——*Marriage—Guardian for—Marriage by a person who was not a guardian—Effect.*

Where the mother and brothers of the minor bride were alive, a marriage contracted by the uncle by marriage, whether he be the husband or the father's sister or mother's sister, is void. (*Broadway, J.*) MD. GHULAM JATIMA *v.* KHAIRA. **77 I.C. 901= A.I.R. 1923 Lah. 674.**

—Marriage—Judicial Separation.

——*Judicial separation—Inability to maintain wife is no ground.*

Inability to maintain the wife is no ground for separation under the Hanafi Law. (*Mukerji, J.*) ASMATI BIBI *v.* SAIMUDDI PATHAN. **79 I.C. 991= A.I.R. 1925 Cal. 533.**

MAHOMEDAN LAW—Marriage — Option of puberty —Marriage—Kharch-i-pandan.

——*Nature of.*

"Kharch-i-pandan" which literally means betel box expenses is a personal allowance to the wife customary among Mahomedan families of rank, especially in Upper India, fixed either before or after the marriage and varying according to the means and position of the parties. Although there is some analogy between this allowance and the pin money in the English system, it appears to stand on a different legal footing arising from difference in social institutions. Although both kharch-i-pandan and pin-money are amounts for the personal expenses of the wife, there is a difference inasmuch as no obligation to spend the money during coverture attaches to the kharch-i-pandan: 32 All. 410 (P.C.) Rel. on. (*Sulaiman and Kendall, JJ.*) ALTAF BEGAM *v.* BRIJ NARAIN. **116 I.C. 855=1929 A.L.J. 367= 51 All. 612=A.I.R. 1929 All. 281.**

——*Husband agreeing to pay certain sum to wife as Kharch-i-pandan—Validity.*

Public policy is always an unsafe and treacherous ground for legal decision and there is nothing in the Mahomedan husband's promise to pay a certain sum of money for the personal expenses of his wife (Kharch-i-pandan) during his life time which can reasonably be regarded as opposed to public policy: Janson *v.* Driefontein Consolidated Mines, Ltd. (1902) A.C. 484 and 32 All. 410 (P.C.), Rel. on. (*Shadi Lal, C. J., and Hilton, J.*) MD. ALI AKBAR *v.* FATIMA BEGAM. **119 I.C. 486=30 P.L.R. 498=11 Lah. 85= A.I.R. 1929 Lah. 660.**

—Marriage—Option of puberty.

——*When can be exercised.*

A woman who is unaware of her marriage at the time when she attains puberty retains her option of repudiation until she becomes aware of the marriage and the option is also prolonged until she is acquainted with the fact that she has the right to repudiate the marriage: A.I.R. 1923 Lah. 502, Foll.; A.I.R. 1922 All. 155; (1929) A.L.J., 101, Appr.; 53 P.R. 1875; 157 P. R, 1879; A.I.R. 1924 Lah. 385; 96 I.C. 1009; A.I.R. 1925 Lah. 66, Ref.; A.I.R. 1928 Lah. 674, Not Foll. (*Tekchand and Hilton, JJ.*) RAHMAT ALI *v.* MT. ALLA DETTA. **30 P.L.R. 664= 11 L.L.J. 393=A.I.R. 1929 Lah. 827.**

——*Suit for declaration of invalidity of marriage by a minor girl—If exercise of such option.*

Where a Mahomedan girl was only 7 months old at the time of the alleged marriage and it was obvious that the transaction was carried through, if it was carried through, with a total disregard of the girl's advantage, in such cases the minor had the option of repudiating on the attainment of puberty. The bringing of the suit was in itself an exercise of that option and it could not be held that there had been any unreasonable delay, and it was intolerable that she should be bound by such a marriage. (*Johnstone, J.*) HASSAN BIBI *v.* FAZAL ILAHI. **121 I.C. 381=A.I.R. 1929 Lah. 804.**

——*If lost by delay.*

In the absence of consummation of marriage or acquiescence, a Mahomedan woman given in marriage by her mother before her puberty, does not lose her right of repudiating the marriage by mere delay after the appearance of puberty: A.I.R. 1922 All. 155, Approved; A.I.R. 1926 Lah. 545, Foll. Mullah's Mah, Law, para 219, Ref. (*Jailal, J.*) MT. GHULAM FATIMA *v.* FAZAL. **116 I.C. 557 (Lah.)**

——*Time for exercise.*

A woman's right of option to repudiate a marriage

MAHOMEDAN LAW—Marriage—Option of puberty.

is prolonged until she is acquainted with the fact that she possesses such a right : A.I.R. 1922 All. 155, Foll. (*Sen and Niamatullah, JJ.*) MT. SUGHRA *v.* MUZAFFARI. **113 I.C. 383=1929 A.L.J. 101**

———*Conditions for exercise of.*

When marriage is effected through the guardianship of the father or grandfather, the minor has no right to avoid such marriage, except in very special circumstances, but if it is contracted by any other person the minor has the right of repudiation which is technically called "the option of puberty." In order the minor may be entitled to exercise the "option of puberty" it is necessary that there should be a marriage which is binding on him or her unless such option is exercised ; and for that purpose the marriage must be valid *ab origne* and brought about by a person other than the father, etc., who stands for the time being in the position of a guardian in marriage of the minor. (*Suhrawardy and Graham, JJ.*) SADUR ALI *v.* ABEDA BIBI. **113 I.C. 153= 32 C.W.N. 640=A.I.R. 1928 Cal. 549.**

———*Knowledge—If a necessary condition.*

(*Obiter.*) In exercising a right of repudiating a marriage by the girl the Imam does not make a knowledge of her right of option a condition, because that is an institute of the law, and ignorance is no plea with respect of an institute of the law, with which it is supposed that every person ought to be acquainted: A. I. R. 1922 All. 155, Ref. (*Suhrawardy and Graham, JJ.*) SUDAR ALI *v.* ABEDA BIBI.

113 I.C. 153=32 C.W.N. 640= A.I.R. 1928 Cal. 549.

———*Girl married before puberty—Option of puberty continues till wife knows of the fact of her marriage.*

In the absence of consummation of her marriage the right of a wife, given in marriage by her mother before she attained the age of puberty, to repudiate her marriage continues until she is acquainted with the fact that she has been married : A.I.R. 1923 Lah. 502, Foll. (*Shadi Lal, C. J. and Cold Stream, J.*) MAULA DAD *v.* MT. FATEH BIBI. **96 I.C. 1009= 27 P.L.R. 377=A.I.R. 1926 Lah. 545.**

———*Shiah girl married to Sunni husband by her father as guardian—She can exercise option of puberty before consummation.*

If a minor Shiah girl has been given away in marriage by her father while of non-age, when it was impossible for her to have any voice in the matter, and on attaining puberty she considers the marriage to be repugnant to her religious sentiments and grossly disadvantageous to herself, it would be contrary to all rules of equity or justice to force such marriage on her and thereby compel her to live with a person who is abhorrent to her. She must be allowed the option to repudiate it. If she allows the marriage to be consummated, or in some other way ratifies the marriage then her option of puberty would go away and the marriage would be a perfectly valid marriage and her issue legitimate. (*Sulaiman and Mukerji, JJ.*) AZIZ BANU *v.* MOHAMMAD IBRAHIM. **89 I.C. 690=47 All. 823= 23 A.L.J. 768=A.I.R. 1925 All. 720.**

———*Principle of acquiescence.*

The principle underlying the crude provisions of the Muhammadan Law, which was promulgated to people living under very different conditions from those which obtain to-day is that there must be no acquiescence so that the question in all similar cases will be "Has the plaintiff acquiesced?" A. I. R. 1924 Lah, 385. (*Campbell, J.*) KHANOR *v.* MT. BHAG BHARI. **76 I.C. 45=A.I.R. 1925 Lah. 66,**

MAHOMEDAN LAW—Marriage—Presumption.

There is no greater option of puberty when a girl is contracted in marriage by her father than when she contracts herself. (*Simpson and Gokaran Nath Misra, A. J. Cs.*) BIBI JAI KISHORI *v.* ALI AHMAD KHAN. **89 I.C. 108=12 O.L.J. 395= A.I.R. 1925 Oudh. 487.**

———*Principle of acquiescence.*

The Muhammadan Law was promulgated to people living under very different conditions from those which obtain to-day and must be interpreted with due regard to the change in public feeling and taste on questions of decency. The principle underlying the crude provisions of Muhammadan Law regarding option of puberty is that there must be no acquiescence so that the question on all these cases will be "has the plaintiff acquiesced." (*Le Rossignol, J.*) HUSSAINA *v.* MT. JIVANI. **69 I.C. 281= A.I.R. 1924 Lah. 385.**

———*When arises.*

The question of option of repudiation does not arise when the girl is still a minor and she has not attained puberty. (*Daniels, J.*) HUB ALI *v.* EMPEROR. **21 A.L.J. 187=4 L.R.A. Cr. 73= A.I.R. 1923 All. 329.**

———*Delay in the exercise of—Effect.*

The right to repudiate a marriage has to be exercised as soon as the minor attains puberty. Where the right had not been exercised for fully a year after the plaintiff had reached the age of puberty. *Held* : that she had lost the option given to her. (A.I.R. 1922 All. 155 Diss.) Where the mother and brothers of the minor bride were alive, a marriage contracted by the uncle by marriage, whether he be the husband of the father's sister or mother's sister, is void. (*Broadway, J.*) MT. GHULAM FATIMA *v.* KHAIRA. **77 I.C. 901=A.I.R. 1923 Lah. 674.**

A girl who is unaware of her marriage at the time when she attains puberty retains her option of repudiation until she becomes aware of it. (*Martineau and Zafar Ali, JJ.*) SULTAN *v.* WARYAM. **73 I.C. 895=5 L.L.J. 473=A.I.R. 1923 Lah. 502.**

———*Sunnis—Marriage during minority—Wife can repudiate when she has knowledge of her right to do so*

The rule laid down by Imam Muhammad is the more reasonable and equitable rule to be applied in India, namely, that a woman's right of option to repudiate marriage performed during her minority is prolonged amongst Sunni Muhammadans until she is acquainted with the fact that she has such a right. In other words that if she does not know that she has a right of rescinding the marriage, she will have the power to do so when she is aware of it. (*Tudball and Lindsay, JJ.*) BISMILLAH BEGAM *v.* NURMAHAMMAD. **63 I.C. 702=44 All. 61=19 A.L.J. 845= A.I.R. 1922 All 155.**

—Marriage—Presumption.

——— *Co-habitation and repute.*

Where a man and woman are living together as husband and wife for a large number of years and have always treated each other as husband and wife have always been looked on as husband and wife, and there is no obstacle to the marriage, the burden is on the person who denies the marriage to prove that it did not take place : 3 M.I.A. 295 (P.C.); A.I.R. 1922 P.C. 159; A.I.R. 1918 P.C. 11 and 31 Cal. 849, Rel. on. (*Brown, J.*) MAUNG KIYI *v.* MASHWE BAW. **121 I.C. 718=7 Rang. 777=A.I.R. 1929 Rang. 341.**

It is only where direct proof of marriage is not available that indirect proof of marriage by way of acknowledgment of legitimacy in favour of a son is

MAHOMEDAN LAW—Marriage—Presumption.
allowed to take the place of direct proof of marriage. Where direct proof is available to establish that marriage was impossible or a marriage would be invalid, no question of presumption of marriage on account of an alleged acknowledgment can arise; A.I.R. 1922 P.C. 159; 10 All. 289, Foll. (*Mears, C. J. and Mukerji, J.*) MD. SHAFIE ULLAH KHAN *v.* NUHULLAH KHAN. **88 I.C. 954=48 All. 58=23 A.L.J. 917= 6 L.R.A Civ. 505=A.I.R. 1926 All. 48.**

S. 112, Evidence Act does not apply to invalid, or fasid marriages. (*Ashworth and Raza, JJ.*) MT. KANIZA *v.* HASAN AHMED KHAN. **92 I.C. 82= 1 Luck. 71=3 O.W.N. 114=A.I.R. 1926 Oudh 231.**

——*Acknowledgment of marriage.*

Although no presumption of marriage can be made from prolonged co-habitation, yet when a man acknowledges that a woman is his married wife, such acknowledgment, though made from ulterior motives, is sufficient in the eyes of Mah. Law to invest the woman with the status of a married wife and her subsequent born children with the status of legitimacy, unless a marriage is shown to have been legally impossible. (*Stuart and Pundit Kanhaiya Lal, A.J.C.*) MAHOMED ALI KHAN *v.* GHAZANFAR ALI KHAN. **60 I.C. 147=7 O.L.J. 474.**

—Marriage—Proof of—

——*Remaining behind purdah—Evidentiary value.*

It is no part of the law of India that to have lived and to remain behind the purdah is a necessary part of a lady's legal marriage or a conclusive evidential fact. It is a circumstance to be considered when the fact of the marriage is in issue. But that issue is to be determined on a broad conspectus of the whole situation, including of course the purdah item. (*Lord Shaw.*) MOHABBAT ALI KHAN *v.* MD. IBRAHIM KHAN. **117 I.C. 17=1929 A.L.J. 465= 33 O.W.N. 645=31 Bom. L. R. 846= 6 O.W.N. 517=56 I.A. 201=50 C.L.J. 89= 30 M.L.W. 97=1929 M.W.N. 676=10 Lah. 725= 31 P.L.R. 1=A.I.R. 1929 P.C. 135=57 M.L.J. 366.**

—Failure to prove kabinnamah does not disprove marriage. (*Mukerji and Mitter, JJ.*) AHASANULLAH *v.* NEJABATALI. **A.I.R. 1929 Cal. 652.**

——*Admission of marriage—Effect of.*

The effect of an admission of marriage, as proof of such marriage, is a question merely of adjective law governed by the Indian Evidence Act. Its probative value must necessarily depend on the surrounding circumstances. (*Rupchand Bilaram and Lobo, A. J.Cs.*) MT. HAKIMA *v.* MT. JIANDI. **103 I.C. 870= A.I.R. 1927 Sind. 209.**

——*Ikrar of marriage—Value of.*

Ikrar of marriage is certainly no more than an admission of marriage to be weighed according to the ordinary rules of evidence and treated as only a piece of evidence which the Court may consider in deciding whether the marriage is proved or not; A.I.R. 1917 P.C. 169, Dist.; 32 All. 345, (P.C.), Ref. (*Rupchand Bilaram and Lobo, A.J. Cs.*) MT. HAKIMA *v.* MT. JIANDI. **103 I.C. 870=A.I.R. 1927 Sind 209.**

—Marriage—Repudiation.

——*Judicial decree—Necessity for.*

The very fact that the Court declares in a suit or in a case which comes before it that there was repudiation is enough to satisfy the requirement of the Mahomedan law about judicial decree confirming a repudiation. It is undoubtedly true that there is need for obtaining a judicial decree, but there is no authority for saying that the judicial decree must be obtained in a proceeding apart from that in which the question of validity of the marriage is raised;

MAHOMEDAN LAW — Marriage—Restitution of Conjugal rights.
19 Cal. 79, Rel. on. (*Suhrawardy and Graham, JJ.*) SADAR ALI *v.* ABEDA BIBI. **113 I.C. 153= 32 C.W.N. 640=A.I.R. 1928 Cal. 549.**

—Marriage—Restitution of Conjugal rights

The mere fact that the wife cannot get on with her husband's mother does not constitute a lawful cause which would justify her refusal to return to her husband's dominion. (*Shadi Lal, C. J. and Hilton, J.*) MD. ALI AKBAR *v.* FATIMA BEGAM. **119 I.C. 486=30 P.L.R. 498=11 Lah. 85= A.I.R. 1929 Lah. 660.**

——*Plea of non-payment of—Prompt dower.*

The suit for restitution of conjugal rights brought by the husband cannot be dismissed on the mere plea of non-payment of prompt dower: 8 All. 149; 17 Cal. 670; 11 Mad. 327; 30 Bom. 122, Rel. on. (*Chari and Mya Bu, JJ.*) ASHIA KHATOON *v.* ABDUL HAKIM MAISTRY. **120 I.C. 129= A.I.R. 1929 Rang. 189.**

——*Legal Cruelty—Accusation of Laan.*

Under the Muhammadan Law, in order to establish legal cruelty between man and wife there must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it. To speak of a wife that she has been living in adultery at a time when she has been so living, can hardly be said to be cruelty at all and in any event it cannot be said that this conduct on the part of the husband disentitled him from claiming restitution: 11 M. I. A. 551 (P.C.), Rel. on. (*Mukerji and Graham, JJ.*) JAMIRADDIN AHMED *v.* SAHERA KHATUN. **101 I.C. 760=54 Cal. 363= 46 C.L.J. 592=A.I.R. 1927 Cal. 579.**

——*Any reprehensible conduct of husband is sufficient for refusing him restitution.*

If a husband's real object in suing for restitution of conjugal rights is to covet his wife's property, a Court of justice will not encourage a covetous husband by subjecting his wife's person to his full and absolute control and forcing her to go under his domain both physically and mentally. Any reprehensible conduct on the husband's part if properly proved affords good ground for refusing to him the assistance of the Court. (*Kinkhede, A.J.C.*) MT. KURSHID BEGUM *v.* ABDUL RASHID. **100 I.C. 169=A.I.R. 1927 Nag. 139.**

——*Maintenance—When allowed.*

The principle, that where a wife is turned out or ill-treated so as to make it impossible for her to live with her husband, or where the breach between the husband and wife is irremediable so that it is impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to maintenance by living separate from him applies equally to the case of a Hindu or a Mahomedan whether the question arises under S. 488, Criminal P.C., or in a suit for restitution of conjugal rights: 170 P.L.R. 1914, Ref. (*Kinkhede, A.J.C.*) MT. KURSHID BEGUM *v.* ABDUL RASHID. **100 I.C. 169=A.I.R. 1927 Nag. 139.**

——*Principles of justice, equity and good conscience—Applicability.*

The principles of justice, equity and good conscience not inconsistent with any positive rule of Mahomedan Law may well be applied in determining the ground on which a claim for restitution of conjugal rights may be refused by the Courts of justice. (*Stuart, C.J., and Wazir Hasan, J.*) MT. MAQBOOLAN *v.* RAMZAN. **101 I.C. 261=2 Luck. 482=4 O.W.N. 247= A.I.R. 1927 Oudh 154.**

——*Unfounded accusation of adultery—Good defence.*

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There is no rule of the Mahomedan Law by which in all circumstances and even in the face of unfounded accusation of adultery a decree for restitution of conjugal rights must be granted against the wife by the Courts of justice: 11 M.I.A. 551 (P.C.), Ref. (*Stuart C.J. and Wazir Hasan, J.*) MT. MAQBOOLAN *v.* RAMRAU. **101 I.C. 261=2 Luck 482=4 O.W.N. 247=A.I.R. 1927 Oudh 154.**

——*Non-payment of prompt dower—Suit is maintainable.*

Non-payment of prompt dower does not render a suit for restitution of conjugal rights unmaintainable. The suit can be decreed conditional on the payment of the dower. 8 All. 149 (F.B.) Foll. (*Walsh and Wallach, JJ.*) HIJABAN *v.* ALI SHER KHAN. **64 I.C. 117=19 A.L.J. 880=A.I.R. 1921 All. 15.**

—Marriage—Settlement—

——*Revocation.*

Once the contract of marriage settlement is complete by the marriage on the one side and the gift of property on the other the donor or settlor has no longer any interest in the property and no right to revoke the deed. (*Kendall and Pullan, A. J. Cs.*) MOHAMAD SHER KHAN *v.* MT. KAMALUN-NISSA. **79 I.C. 716=11 O.L.J. 703=27 O.C. 397=A.I.R. 1925 Oudh 289.**

—Marriage Validity,

——*Marriage with wife's sister—Fasid and not Batil.*

Under the Mahomedan law governing Hanafi sect marriage with wife's sister during the subsistence of previous marriage with her sister, is only Fasid and not Batil, and the issue of such marriage is legitimate and inherits from the father: 41 Bom. 485 and A.I.R. 1926 Oudh 231, Appr.; 23 Cal. 130 Diss. from. (*Tek Chand and Agha Haidar, JJ.*) TALIAMAND *v.* MUHAMMAD DIN. **A.I.R. 1930 Lah. 907.**

——*Marriage contracted within the period of iddat.*

A marriage contracted within the period of iddat is a fasid marriage and being only fasid or vitiated by a temporary defect can give rise to a right of inheritance between the two parties. Where therefore marriage takes place within the period of iddat, the husband is entitled to inherit the wife's property under Mahomedan Law: 23 Cal. 130; 41 Bom. 485, Rel. on. (*Pullan, J.*) MAHOMED SHAFI *v.* RAUNAQ ALI. **107 I.C. 882=5 O.W.N. 20=A.I.R. 1928 Oudh. 231.**

—Mutaa is not valid if at the time the woman is found to be the married wife of another person. A.I.R. 1922 P. C. 159 Foll.

In the proper sense there is no legitimation under the Mahommedan law. Under that law a son to be legitimate must be the offspring of a man and his wife, or of a man and his slave. Any other offspring is the offspring of zina, that is, illicit connexion and cannot be legitimate. The term "wife" necessarily connotes marriage, but as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available but if there be no such, indirect proof may suffice. An acknowledgment of legitimacy in favour of a son is one way of indirect proof. This acknowledgment must be not merely of sonship, but must be made in such a way that it shows that the acknowledgor meant to accept the other not only as his son, but as his legitimate son. It must not be impossible on the face of it, *i.e.*, it must not be made when the ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when mother

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spoken to in acknowledgment, being the wife of another or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, the acknowledgment has more than a mere evidential value. It raises a presumption of marriage—a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not *juris et de jure*, it is like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant-son who has in his favour a good acknowledgment of legitimacy is in this position. The marriage will be held proved and his legitimacy established unless the marriage is disproved. Unless the claimant establishes his acknowledgment, the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact. (*Wazir Hasan and Gokar Nath Misra, JJ.*) AGA MAHOMED IBU ALI *v.* ZOHRA BEGAM. **105 I.C. 490=1 L.C. 549=A.I.R. 1927 Oudh. 562.**

Shia girl can be validly married to a Sunni. (*Ashworth, J.*) MT. UMMATUL FATIMA *v.* ALI AKBAR. **95 I.C. 271=13 O.L.J. 735=3 O.W.N. 195=A.I.R. 1926 Oudh 521.**

——*Marriage with wife's sister.*

Under Mahomedan law the marriage of a man to a sister of his existing wife, though invalid for certain purposes, is valid for the purpose of legitimizing the issue. 41 Bom. 485, Foll. 23 Cal. 130, not Foll. (*Ashworth and Raza, JJ.*) MT. KANIZA *v.* HASAN AHMAD KHAN. **92 I.C. 82=1 Luck 71=3 O.W.N. 114=A.I.R. 1926 Oudh 231.**

——*Marriage of Sunni with Shiah is not illegal.*

The marriage of a Shiah girl with a Sunni husband is not absolutely illegal so as to make it void, it is only obnoxious. (Muhammadan texts discussed at length.) 6 W.R. 88, Ref. to. (*Sulaiman and Mukerji, JJ.*) AZIZ BANU *v.* MUHAMMAD IBRAHIM. **89 I.C. 690=47 All. 823=23 A.L.J. 768=A.I.R. 1925 All. 720.**

——*Contracts of marriage entered into through guardians—Binding, nature of.*

In a case of marriage between Muhammadans the real contracting parties are the husband and the wife and under their personal law they are entitled to enter into contract of marriage even before they have become major under that law; and the contracts of such minors are entered into through their guardians specified by their personal law. Those contracts are as good as those entered into by the minor himself or herself for the purpose of creating rights and obligations. 39 Cal. 239, Dist. (*Suhrawardy and Duval, JJ.*) FAZARA KHATUN BIBI *v.* METIOR RAHMAN. **88 I.C. 748=A.I.R. 1925 Cal. 1235.**

——*Consideration illegal—Marriage not void on that account.*

Where the bridegroom a prosecution witness undertook to attenuate his evidence so as to save bride's father from punishment.

Held: this consideration for the marriage contract was illegal but if the other formalities of Mahomedan Law were validly gone through the marriage would not be a nullity. (*Kennedy and Rupchand Bilaram, A.J.Cs.*) HAFIZAN *v.* SAIDINO. **86 I.C. 301=A.I.R. 1925 Sind 22.**

——*Sunnis—Pregnancy of bride at marriage, unknown to husband.*

Among Sunnis where at the time of the marriage the bride is pregnant but the fact is not known to the husband, the marriage is not invalid merely on that

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ground. In such a case, where the husband has not divorced his wife, the latter is entitled to her prompt dower. 31 All. 343, Dist. (*Macleod, C.J., and Heaton, J.*) KULSAMBI *v.* ABDUR KADIR.
59 I.C. 433=45 Bom. 151=A.I.R. 1921 Bom. 205.

Where a Nikah is read without the brides consent and in her absence the Nikah is invalid. (*Chevis, J.*) BEGAM *v.* FAIZA BAKSHA. **60 I.C. 734=3 U.P.L.R. (31 Lah.)**

—Partition.

———*Law applicable.*

There is no such thing as "joint family property" amongst Mahomedans and in the absence of any allegation much less proof that according to an immemorial custom the parties had adopted the principles of Hindu Law the Court is bound to apply the principles of Mahomedan Law in determining the claim for partition: A. I. R. 1922 Sind 41 and 38 Mad. 1099. Rel. on. (*Rupchand and Barlee, A. J. Cs.*) ABDUL RAHMAN *v.* HAJI MD. IDRIS. **118 I.C. 207=23 S.L.R. 461=A.I.R. 1929 Sind 212.**

———*Partition of partnership property.*

S and *H*, both Mahomedan ladies, instituted a suit in 1924 for partition and possession of their share in certain immovable properties which *E* husband of *S* and father of *H*, was said to have died possessed of. The suit properties were included in a partnership business, *E* died in 1898. From that time the properties remained under the management of those who directed the partnership business. The rents realized therefrom were entered in the firm's rokar; the bills of rent were issued and suits for its recovery were filed in the name of the firm and in respect of each immovable property a separate khata was maintained treating each item as an asset of the firm. This continued upto 1917 when *G* the son of *E* also died.

Held: that the suit for partition of property which is partnership property of *E* is incompetent as framed.

Held further: that even the suit for settlement of accounts of the partnership, dissolved by the death of *E* and subsequently by the death of *G*, is statute barred. (*Percival, J. C. and Rupchand, A.J.C.*) ISMAIL *v.* TAYABALLI. **A.I.R. 1929 Sind 182.**

———*Agreement after partition decree to hold properties as tenants-in-common—Fresh partition suit is maintainable.*

Where after a decree for partition there was an agreement between the parties to continue to hold the properties as tenants-in-common without division.

Held: that the agreement must be regarded as furnishing a new cause of action and that a fresh partition suit can be maintained: 25 Mad. 300 (F.B.) Dist. (*Odgers, J.*) ABDUL SAMAD KHAN *v.* BIBIJAN. **91 I.C. 618=1925 M.W.N. 543=A.I.R. 1925 Mad. 1149=49 M.L.J. 675.**

———*Suit for self-acquisitions—Burden of proof.*

In a partition suit among Mohammadans the burden is on the plaintiff to prove that the consideration for the acquisition of property by one member only came from the joint fund. (*Raymond, A.J.C.*) YUSIF MAHOMED *v.* ABUBACKER IBRAHIM, **78 I.C. 817=A.I.R. 1925 Sind 26.**

——— *Hindu Law rule against partial partition is not applicable.*

Mahomedans are never joint in estate but only tenants-in-common whether they live together or not. Therefore to try and decide the question of Musalman law in the light of decisions in suits between Hindu co-parceners is not only to waste time but to risk error. Tenants-in-common are not obliged to sue for a partition of all other properties in which they are interested. There is nothing to preclude one of the joint owners

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of several items of property from seeking a partition of one of such items ot property. Under Mahomedan Law, the estate of a deceased person devolves on his death on his heirs and each of the heirs becomes entitled to his definite fraction of every part of the estate. It is therefore futile to describe a suit, in which one heir claims to receive his share of the property of the deceased from another heir, as suit for partial partition and to say that therefore the suit is not maintainable. Both the terminology and the principles of Hindu Law are in such case inapplicable. (*Kincaid, J. C. Raymond and Kennedy, A. J. Cs.*) VAZIR *v.* DWARAKAMAL. **79 I. C. 841=16 S.L. R. 133=A. I. R. 1922 Sind 41.**

———*Limitation Act, Arts.* 144 *and* 123—*Suit for share—Mahomedan family continuing tenants-in-common—Limitation.*

Where the members of a Mahomedan family continue to live as tenants-in-common without dividing the estate of a deceased ancestor, limitation will not run from the time of his death, and the article applicable for a suit for distributive share is Art. 144 and not Art. 123, 44 Bom, 942, Foll. (*Macleod, C. J. and Fawcett, J.*) NURDIN NAJBUDIN *v.* BU UMRAO. **59 I. C. 780=45 Bom. 519=A. I. R. 1921 Bom. 56.**

———*Partial partition may be allowed.*

In the case of Muhammadans, the co-heirs are only tenants-in-common, and there is no joint family in the Hindu Law sense of the term. The rule in their case against partial partition is not so rigid and partial partition may be allowed if there is not much inconvenience to the other sharers and if the plaintiff will otherwise be left without a remedy. (*Spencer and Ramesam, JJ.*) MOIDIN KUTTI *v.* F. MARIAMUMMA. **70 I. C. 113=14 M.L.W. 502=41 M. L. J. 457=A. I. R. 1921 Mad. 404.**

—Pre-emption—Applicability.

———*Law of pre-emption applies to Burma.*

The right of pre-emption in Muhammadan law between co-sharers exists in Burma under S. 13 (1) of the Burma Lands Act (1919) 3 U. B. R. 154, applied: 6 M. H. C. 26, Dist. (*Rutledge, and Heald, JJ.*) (SYED) EBRAHIM *v.* P. N. SYED KHAN. **95 I. C. 83=4 Bur. L. J. 267=4 Rang. 13=A.I. R. 1926 Rang. 79.**

—Pre-emption—Custom.

———*Law is not applicable to non-Mahomedans except by custom.*

The Mahomedan law of pre-emption cannot be accepted in the case of non-Mahomedans on the ground of justice, equity and good conscience in its entirety except on the ground of custom: 7 All. 775 (F.B.), not Foll.; 6 M. H. C. 26; 4 B. L. R, 134 (F.B.) and 40 Bom. 358, Foll. (*Patkar and Murphy, JJ.*) MAMEDMIA BALAMIYA *v.* JOSEPH BENJAMIN **118 I. C. 548=53 Bom. 525=31 Bom. L. R. 374=A. I. R. 1929 Bom. 206.**

———*Bene Israel vendee in Ahmedabad, is not bound in absence of custom.*

In the absence of custom a non-Mahomedan Bene Israel vendee cannot be bound by the law of pre-emption even though the law of pre-emption may have been established as customary law applicable to Hindus and Mahomedans in Ahmedabad: 39 Cal. 915 (P.C.), Expl.; 8. W.R. 446, Ref. (*Patkar and Murphy, JJ.*) MAMEDMIYA BADAMIYA *v.* JOSEPH BENJAMIN, **118 I. C. 548=53 Bom. 525=31 Bom. L. R. 374=A. I. R. 1929 Bom. 206.**

———*Proof of custom as to house property is not sufficient to prove custom as to lands.*

The facts that a decree for pre-emption for a piece of land in the city was passed so far back as the year

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1865 and that possibly a similar decree had been passed some years earlier would not be sufficient to show that such a custom extended to lands within the city. On the contrary the fact that no instance of the pre-emption of such lands could be established between the year 1865 and the year 1920, when this suit was brought, is the strongest possible proof that no such custom exists. 45 B. 604 Foll.

The considerations which apply in the case of village property do not apply necessarily to property in the cities. The custom in the villages has grown up out of the desire to prevent the intrusion of strangers into the co-parcenary bodies, no such consideration would arise in the cities, where people of all classes congregate together. (*Rafique and Lindsay, JJ.*) RAM CHAND KHANNA *v.* GOSWAMI RAM PURI.

74 I. C. 379=45 All. 501=21 A. L. J. 385=4 L. R. A. Civ. 430=A. I. R. 1923 All. 513.

—Pre-emption—Estoppel.

The fact that after the death of the successful pre-emptor the vendor himself has become the legal representative is not enough to estop the latter from taking the benefit of the decree. (*Sulaiman and Kendall, JJ.*) BINDRABAN *v.* DURAG SINGH.

1930 A. L. J. 369=A. I. R. 1930 All. 220.

Pre-emptor having notices of sale—He is not estopped from claiming pre-emption after the sale. (*Lindsay and Sulaiman, JJ.*) MAHOMED ASKARI *v.* RAHMAT ULLAH, **105 I. C. 771=25 A.L.J. 473=49 All. 716=A.I.R. 1927 All. 548.**

—Pre-emption—Formalities.

———*Demand 'combined'—Meaniny of.*

Where there has been an interval of time between the first and the second demand and the first demand is neither made on the premises, nor in the presence of the vendors or the vendees the demand cannot be considered as combined. (*Sulaiman and Kendall, JJ.*) RAHIM BUKSH *v.* MT. BACHAUNA.

123 I. C. 380=1930 A. L. J. 711=A. I. R. 1930 All. 445.

———*Demands.*

Under Mahomedan Law absence of reference in the second demand to the first demandis fatal; A.I.R. 1923 All. 251, Ref. (*Sulaiman and Kendall, JJ.*) RAHIM BUKSH *v.* MT. BACHAUNA. **123 I. C. 380=1930 A.L.J. 711=A.I.R. 1930 All. 445.**

———*First demand.*

Where a person on hearing of the sale immediately said "I am pre-emptor, I possess the right of pre-emption and shall pre-empt," that is a perfectly valid first demand inasmuch as he did not merely say that he was pre-emptor which would be mere statement of fact but he added that he would claim pre-emption. (*Sulaiman and Banerji, JJ.*) SAIDUDDIN *v.* MOHIUDDIN. **115 I.C. 643=1929 A.L.J. 857=A.I.R. 1929 All. 556.**

———*First demand—No formula.*

Although the word used by the pre-emptor was "purchase" there is no hard and fast formula which has to be adhered to in performing the first demand. It is the intention which must be gathered from the words used and the surrounding circumstances. (*Sulaiman and Sen, JJ.*) MOHAMMED RAZA ALI KHAN *v.* MOHAMMAD ISRAR HASAN KHAN. **121 I.C. 218=1929 A.L.J. 531=A.I.R. 1929 All. 459.**

———*Second demand—Unreasonable delay from the first—Presumption of waiver.*

Where land adjoining pre-emptor's land at Shahjahanpur was sold on 13th November 1923 while he was at Bhopal, on receiving the news of the sale at Bhopal through his son in March 1924, immediately made the first demand and took no steps to make the second demand until 10th April and failed to explain the delay.

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Held: that the second demand was not performed in due compliance with the requisition of the Mahomedan law as the second demand was not made as soon after the first as was practicable and as during the interval of six months intervening between the sale-deed and the second demand the vendee might very well have spent money on the improvement of the property. The second demand is to be treated as a public affirmation of the making of the first demand and an intimation to the vendee that the property would be pre-empted. A delay of this kind may prejudice the vendee and it may induce him to act on the supposition that the right of pre-emption was waived: 6 W. R. 173; 6 B.L.R. 165; 12 C. L. R. 312; 16 W. R. 13, Ref. 39 Cal. 915, (P, C.) Foll. (*Sulaiman and Sen, JJ.*) MD. RAZA ALI KHAN *v.* MD. ISRAR HASAN KHAN.

121 I.C. 218=1929 A.L.J. 531=A.I.R. 1929 All. 459.

———*Invocation of witnesses—When necessary.*

In a case of pre-emption under Mahomedan law in order to dispense with the necessity of Talad-i-Ishhad the Talab-i-Mowasibat must be accompanied by the formality that is prescribed under the Mahomedan law as to the invoking of witnesses. If this invocation of witnesses has been done in the first demand no second demand would be necessary, otherwise the second demand is absolutely necessary, 4 B.L.R.A.C. 171 and 8 B.L.R. 455, Ref. (*Mukerji and Bose, JJ.*) HAMITULLA *v.* KARIM BUX. **114 I.C. 155=48 C.L.J. 548=A.I.R. 1929 Cal. 136.**

———*Invocation of witnesses is a necessary formality for* talab-i-ishtishhad.

The invocation of witnesses is a necessary formality for the *talab-i-ishtishhad*; if that is done at the time of making the *talab-i-mowasibat*, in the presence of the seller or purchaser or on the premises there is no necessity for the second demand: 10 Cal. 1008, *Foll*: 17 Cal. 543 (F.B.), Ref. (*Cuming and Mukerji, JJ.*) ABDUL RAHIM *v.* TUFAN GAZI. **109 I.C. 284=55 Cal. 1181=32 C.W.N. 1163=A.I.R. 1928 Cal. 584.**

———*Invocation of witnesses—No prescribed form is necessary,*

No particular form of words is necessary for the invocation of witnesses, but claimant must say in presence of witnesses to the following effect: "Such a person bought such a property (sufficiently indicating same) of which I am the Shufi; I have already claimed my right of Shufa and now again claim it, be, therefore, witness thereof." Even where the two demands are combined, the last word or words to that effect must be said: 4 B.L.R.A.C. 171 and 8 B.L.R. 455, Rel. on. (*Cuming and Mukerji, JJ.*) ABDUL RAHIM *v.* TUFAN GAZI. **109 I. C. 284=55 Cal. 1181=32 C.W.N. 1163=A.I.R. 1928 Cal. 584.**

———*Several vendees—Second demand must be made to all vendees.*

Where property is sold to several vendees, the second demand to be effective in respect of the whole property must be made to all the vendees, if it is not made in front of the property sold. If the demand is made to only some of the vendees, only the shares of such vendees can be pre-empted and not the whole property: A.I.R. 1923 All. 355, Rel. on. (*Lindsay and Sulaiman, JJ.*) MAHOMED ASKARI *v.* RAHMATULLAH. **105 I.C. 771=25 A.L.J. 473=49 All. 716=A.I.R. 1927 All. 548.**

———*Witnesses present at the first demand—Omission to ask them at the second demand to bear testimony is not fatal to the pre-emptor's right.*

Where a pre-emptor actually makes the first demand in the presence of the witnesses and asks

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them to accompany him to the vendees in order that a second demand might be made in their presence and they both state that they heard the second demand being made and their attention was attracted to it, the mere omission to ask them in express terms to bear testimony would not be fatal to the pre-emptor's right: 28 All. 24 and A.I.R. 1923 All. 251 Dist. (*Lindsay and Sulaiman, JJ.*) AHMAD HAKIMULLAH *v.* MD. K. HIKMAT ULLAH.

100 I.C. 39=49 All. 385=25 A.L.J. 312= A.I.R. 1927 All. 289.

———*Second demand—Mention of first demand is necessary.*

At the time of making the second demand a mention of the first demand is necessary in order to inform the vendee that it was promptly made as required by law. (*Lindsay and Sulaiman, JJ.*) AHMAD HAKIMULLAH *v.* MD. HIKMATULLAH. **100 I.C. 39= 49 All. 385=25 A.L.J. 312=A.I.R. 1927 All. 289.**

———Talab-i-mowasibat *must be performed immediately on hearing of sale unless information was disbelieved.*

The Mahomedan Law requires that on the receipt of information as to the sale the plaintiff must perform the ceremony of *talab-i-mowasibat* immediately without any loss of time. Even a short delay will not be excused. But if a plaintiff in a suit for pre-emption receives an information as to the sale which he doubts or has reason to doubt, any delay that takes place before he gets an authentic information would be no delay within the meaning of the law.

The plaintiff on receipt of the information went to the vendors who lived close by for either definite information or for confirmation of the information which he had received. But it was found that he did not disbelieve the information when he was given to understand that the sale had taken place.

Held: that in the circumstances the delay caused by his going to the vendor was inexcusable and that he forfeited his right. (*Greaves and Chakravarti, JJ.*) LAL MAHAMMED SIRKAR *v.* HUSSAIN MAHAMMAD SAHA. **86 I.C. 638=29 C.W.N. 400= A.I.R. 1925 Cal. 655.**

———*Nature of.*

Muhammadan law requires that the pre-emptor immediately on hearing of the sale should make known his intention of exercising his option of purchase. He should rise and declare his intention there and then whether witnesses or present or not. The ceremony is known as talab-i-mowasibat. Having done this he must also with the least practicable delay make a formal declaration claiming his right of pre-emption before witnesses in the presence of either the vendor or the vendee or on the premises sold. The ceremony is known as talab-i-ish-had. (*Dawson-Miller, C.J. and Macpherson, J.*) TOKH NARAIN v. RAM RACHHYA SINGH, **90 I.C. 806=7 P.L.T. 233=5 Pat. 96= 1925 P.H.C.C. 265=A.I.R. 1925 Pat. 743.**

———*Demand.*

The plaintiff pre-emptor need not make fresh demands when the vendee, to whom he had already made the demands required by law, transferred the property to another person. (32 All. 45; 11 A.L.J. 527, Foll.) (*Sulaiman and Kanhaiyalal, JJ.*) MUHAMMAD ABDUL *v.* MUHAMMD AYYUB. **79 I.C. 1053= 22 A.L.J. 817=5 L.R.A. Civ. 593=46 All. 889= A.I.R. 1924 All. 806.**

Second demand to vendor is sufficient where possession has not passed to vendee.

Where possession of the property had not passed to the vendee, *held*: that the second demand made to the vendor was quite sufficient. (*Lindsay and Sulaiman, JJ.*) ZAMANI BEGAM *v.* KHAN MUHAMMAD, **81 I.C. 586=45 All. 142=21 A.L.J. 908= A.I.R. 1924 All. 251.**

MAHOMEDAN LAW—Pre-emption—Nature of right

———*Second demand made in presence of one of several vendees is invalid.*

The Muhammadan Law requires that the second demand should be made either in presence of the vendor or vendee or on the property that is the subject of pre-emption. The singular words vendor and vendee include the plural also. According to the interpretation of the Muhammadan Lawyers, if the demand is made neither in the presence of vendor nor on the property sought to be pre-empted but in the presence of the vendee then in case there are more than one vendee, the demand should be made in the presence of all. (*Rafique and Lindsay, JJ.*) ALIMAN BEGAM *v.* ALI HASAN. **73 I.C. 1029= 45 All. 449=A.I.R. 1923 All. 355.**

———*Omission to refer to first demand at the second demand is fatal to the claim.*

If there is the omission at the second demand to call the attention of witnesses to the first demand the requirements of the Mahomedan Law are not complied with, even when the Talab-i-istishhad is made in the presence of witnesses in whose presence the first demand was made. (*Rafique and Piggott, JJ.*) SADIQ ALI *v.* ABDUL BAQIU KHAN. **71 I.C. 460= 21 A.L.J. 109=45 All. 290=4 L.R.A. (Civ.) 99= A.I.R. 1923 All. 251.**

———*Demands—Delay in making—Invalidates claim.*

For two or three months before the demands were made the plaintiff had an intention of bringing a suit for pre-emption in respect of the sale-deed. He made up his mind to bring a suit when he claimed pre-emption. He said so also when he fulfilled the conditions of pre-emption.

Held, it is obvious that the demands required by the Muhammadan Law were not made immediately after learning of the sale in question by the plaintiff. He therefore, cannot succeed in his present claim. (*Rafiq and Piggott, JJ.*) ABDUL RAHMAN *v.* MT. RIFAQTULNISSA. **65 I.C. 641=A.I.R. 1923 All. 229.**

———*Unnecessary delay in asserting claim is fatal.*

Where the Mahomedan law of pre-emption is followed by Hindus the formalities required by Mahomedan law must be strictly complied with and there must be clear proof that they have been duly observed. One of these requirements is that the pre-emptor must assert his claim immediately on getting information of sale. Any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. 13 W.R. 299 Dist. (*Mookerjee, A. C. J. and Fletcher, J.*) NABIN CHANDRA *v.* RAJANI CHANDRA. **63 I.C. 196=25 C.W.N. 901= A.I.R. 1921 Cal. 162.**

—Pre-emption—Nature of right.

———*The right is not incident of property but a personal right.*

The right of pre-emption is not a right which attaches to the land but is a personal right. It arises only out of a valid, complete and *bona fide* sale, and in the case of no other alienation. It is not an incident of property: 4 B. L. R. 134 (F. B.), Foll.; 7 All. 775 (F.B.), not Foll. (*Patkar and Murphy, JJ.*) MAMEDMIYA BADAMIYA *v.* JOSEPH BENJIAMIN. **118 I.C. 548=53 Bom. 525=31 Bom. L.R. 374= A.I.R. 1929 Bom. 206.**

MAHOMEDAN LAW — Pre-emption—Nature of right—Doctrine of Shaffa.

—Pre-emption—Nature of right—Doctrine of Shaffa.

The doctrine of Shaffa, as it is at present accepted, does not appear to be based entirely on the ground of preventing a disagreeable stranger from coming in, but it is on a conjunction with the lands sold that the right of shaffa is grounded. (*Chatterjee, Ag. C. J. and Greeves, Rankin, Suhrawardy, Panton Mukerji and Mullick, JJ.*) ENATULLAH *v.* SHEIK KOWSHER ALI. **98 I.C. 220=54 Cal. 266=44 C.L J. 194=31 C.W.N. 14=A.I.R. 1926 Cal. 1153 (S.B.)**

—Pre-emption—Partial.

———*Preliminary demands as to all items—Pre-emptor can sue for some of them only.*

Where several items of properties are sold under a sale-deed, and the preliminary demands have been made by the pre-emptor in respect of all the items, the plaintiff is not bound to sue for pre-emption of all these items but is entitled to confine his claim to a portion only. (*Sulaiman and Kendall, JJ.*) MT. SUNDARI BEGAM *v.* MT. RAZIA KHATUN. **115 I.C. 463=1929 A.L.J. 187=A.I.R. 1929 All. 158.**

———*Pre-emption partly under Agra Pre-emption Act and partly under Mahomedan Law—Failure of one—Whole claim fails.*

Where the property sold by the vendor consisted of a zamindari share as well as a one-third share in a house and a sugarcane pressing mill and the plaintiff sued to pre-empt the zamindari under the provisions of the Agra Pre-emption Act, and the share in the house and the mill on the basis of the Mahomedan law but he was disqualified under Mahomedan law to claim pre-emption necessary demands not having been made.

Held : his claim based on the provisions of the Act must also fail on the ground of partial pre-emption : 11 All. 108; 21 All. 119; 12 A.L.J. 88; and A.I.R. 1921 All. 201, Foll. (*Sulaiman and Iqbal Ahmad, JJ.*) ABDUL KHAN *v.* SHAKIRA BIBI. **108 I.C. 573=50 All. 348=25 A.L.J. 1061=A.I.R. 1928 All. 124.**

—Share of one of the vendees can be pre-empted. (*Lindsay and Sulaiman, JJ.*) MUHAMMADA ASKARI *v.* RAHAMATTULLAH. **105 I.C. 771=25 A.L.J. 473=49 All. 716=A.I.R. 1927 All. 548.**

—Pre-emption—Persons entitled.

A person has no right to claim to be a shafi khalit because his tree spreads branches over the neighbouring land : 19 Bom. 420, Ref, (*Sulaiman and Banerji, JJ.*) AZIZ AHMAD *v.* NAZIR AHMAD. **103 I.C. 897=25 A.L.J. 1034=A.I.R. 1927 All. 504.**

———*One co-parcener has pre-emption right against another.*

One co-parcener has a right of pre-emption against another under Mahomedan Law,

To hold that one co-parcener has no right of pre-emption against another would be to deny him the right of equality and would be a violation of the Hedaya rule that the rights of all are equal: 4 Cal. 831 (F.B.), overruled : 19 All. 466 and 44 Bom. 887 (F,B.) Appr.

The doctrine of shaffa, as it is at present accepted, does not appear to be based entirely on the ground of preventing a disagreeable stranger from coming in, but it is on a conjunction with the lands sold that the right of shaffa is grounded. (*Chatterjee, Ag. C. J. Greaves, Rankin, Suhrawardy, Panton, Mukerji and Mullick, JJ.*) ENATULLAH *v.* SHEIKH KOWSHER ALI. **98 I.C. 220=54 Cal. 266=44 C.L.J. 194=31 C.W.N. 14=A.I.R. 1926 Cal. 1153 (S.B.)**

MAHOMEDAN LAW—Pre-emption—When arises.

Owner of plot can pre-empt though not residing on the plot, (*Adami and Macpherson, JJ.*) MT. SHEORATNI *v.* MUNSHI LALL. **97 I.C. 618=6 Pat. 154=7 P.L.T. 604=A.I.R. 1926 Pat. 542.**

———*Co-sharers—Rights of.*

Where two co-sharers in a property have equal rights of pre-emption these rights ought to be given effect to by allowing each to pre-empt half the property transferred. 19 A. 466; 21 A. 292 Foll. (*Lindsay and Kanhaiya Lal, JJ.*) NADIR HUSAIN *v.* SIDIQ HUSAIN. **86 I.C. 589=47 All. 324=23 A.L.J. 138=6 L.R. A. (Civ.) 19=A.I.R. 1925 All. 361.**

———*Mortgagee in possession not a co-sharer.*

Although for certain fiscal purposes a mortgagee in possession is treated under the Land Revenue Act as a co-sharer he cannot be deemed a co-sharer for the purpose of pre-emption. (*Lindsay and Sulaiman, JJ.*) PADAM SINGH *v.* UMRAO SINGH. **75 I.C. 104=21 A.L.J. 527=4 L.R.A. (Civ.) 272=A.I.R. 1924 All. 48.**

———*Vendee and pre-emptor equally related to vendor—Property must be divided between pre-emptor and vendee,*

Where both the pre-emptor and the vendee stand in the same degree with respect to the vendor whether as owners of dominant tenements or as owners of servient tenements in respect of different portions of their properties, the property in dispute ought to be divided between the pre-emptor and the vendee. (A. I. R. 1922 All. 157 Ref.) (*Rafique and Lindsay, JJ.*) ZIA UDDIN *v.* MD. ABUL HASAN. **77 I.C. 27=45 All. 487=A.I.R. 1923 All. 520.**

———*Co-sharers—Degree of nearness not recognised.*

The co-sharers in a *mahal*, though they may not own rights in various portions of the *mahal*, stand upon the same footing so far as the right of pre-emption under Muhammadan Law is concerned. The joint liability for the Government Revenue, is a test of the co-parcenary contemplated by the Muhammadan Law. Muhammadan Law does not recognize degrees of nearness in the same class of pre-emptors and all who come within the definition of *Shafi Shareek i.e.* are in the same category, stand on the same footing. (*Tudball and Sulaiman, JJ.*) SYEEDUDDIN *v.* LATIFUNNISSA. **64 I.C. 456=44 All. 114=19 A.L.J. 909=A.I.R. 1922 All. 391.**

———*Pre-emptor and vendee belonging to same class—Both are entitled,*

Where both the vendee and the pre-emptor are in the same category of pre-emptors, according to Muhammadan Law of pre-emption, the property must be shared equally by the two claimants, and the suit for pre-emption cannot be dismissed. *Amir Hasan v. Rahim Baksh*, (1897) 19 All. 466 followed. (*Tudball and Sulaiman, JJ.*) MUHAMMAD YAKUB *v.* KANHAI LAL. **64 I.C. 673=44 All. 83=19 A.L.J. 869=A.I.R. 1922 All. 157.**

—Pre-emption—When arises.

———*Shiah Law—Property not joint at time of sale or at any time previously—Right of way enjoyed in common by owners of several houses—No right of pre-emption arises on sale of one of the houses.*

Under the Shia Law there can be no right of pre-emption except in relation to property which is held jointly or which was at one time held jointly and has been divided off, while the roads and rivulets passing through them continue to be held in joint proprietary right.

Where the properties are or were not held jointly at any time, but a right of way is enjoyed jointly by the owners of the properties, and this right of way is sold by one of them along with his property there can be

MAHOMEDAN LAW—Pre-emption—When arises.

no right of pre-emption, because there never was any original partnership in respect of the said properties to permit of the right of way being treated as a residuum of that joint right. The right of way enjoyed jointly by the owners of the properties, is only a subsidiary or beneficial right appertaining to each property but not a right flowing out of the joint nature of the properties held by each. (*Lindsay and Kanhaiya Lal, JJ.*) HUSSAIN BAKSH *v.* MAHFUZUL HAQ.
88 I.C. 972=47 All. 944=
23 A.L.J. 617=6 L.R.A. (Civ.) 513=
A.I.R. 1925 All. 559.

——*Right arises even on complete irrevocable contract of sale.*

A right of pre-emption arises not only when an out-and-out sale has been completed but also when a complete contract of sale (without any option in the vendor) has been made. (*Lindsay and Sulaiman, JJ.*) ZAMANI BEGUM *v.* KHAN MUHAMMAD. **81 I.C. 586=**
46 All. 142=21 A.L.J. 908=
A.I.R. 1924 All. 251.

——*Sale valid under Muhammadan Law, though not under T. P. Act, will give rise to right of pre-emption.*

A agreed to sell certain properties to *B* subject to the right of pre-emption by *X*. On the same day *A* wrote to *X* as follows: "I have this day sold my property to *B* for Rs. 29,999. As you are a co-sharer, if you are desirous of purchasing it you should send the amount of Rs. 29,999 to me within 2 days from the receipt of this intimation. Otherwise I shall close the bargain already made by me."

Held that this amounted to an admission that the general law of pre-emption was applicable to the parties, that the rights of the parties are governed by that general law, that under that law the date of sale for purposes of pre-emption was the date of the said agreement, notwithstanding there was no registered document of sale. In determining what system of law was to be taken as applying and what was to be taken to be the date of the sale for the purpose of performing ceremonies for pre-emption, the intention of the parties should be looked into. (*Viscount Haldane.*) SITARAM *v.* JIAUL HASAN.
64 I.C. 826=45 Bom. 1056=
14 M.L.W. 604=48 I.A. 475=
24 Bom. L.R. 595=26 C.W.N. 221=
1922 M.W.N. 63=30 M.L.T. 120=
A.I.R. 1923 P.C. 41 (P.C.).

——*Registered sale-deed unnecessary.*

A right of pre-emption arises under Muhammadan Law where there has been an oral agreement to sell land followed by payment of price and delivery of possession to the purchaser. Section 54 does not apply to a sale under Muhammadan Law and no registered sale-deed is required. (16 All. 344) Foll. (*Macleod, C. J. and Shah, J.*) ABDULLA AVJAL MOMIN *v.* ISMAIL MUGAL FODA. **64 I.C. 913=**
46 Bom. 302=23 Bom. L.R. 1079=
A.I.R. 1922 Bom. 124.

——*Transfer of Proprietary possession—Essential.*

The right of pre-emption does not extend to such cases under the Mohammadan Law where only the mokurari interest is transferred. Unless the proprietary possession is transferred the right of pre-emption does no accrue. As the main pedestal on which the right of pre-emption stands is reciprocity the pre-emptor must have the milkiat or ownership in the property on account of which he claims the right of pre-emption. 10 All. 472 Ref. If a house is sold apart from the land on which it stands with a view to being pulled down,

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no right of pre-emption can be claimed with respect to it. If it is for occupation, then pre-emption can be claimed on the ground of vicinage by the owner of the adjoining house. 2 All. 99 Foll. (*Coutts and Sultan Ahmad, JJ.*) MAHOMED JAMIL *v.* KHUB LAL RANT.
2 P.L.T. 138=1921 P.H. C. C. 130=
A.I.R. 1921 Pat. 164.

—Pre-emption—Miscellaneous.

——*"Hait"—Meaning.*

The word "hait" is not adequately represented by the English word "garden," probably not even literally, and certainly not in the sense in which "hait" is liable to pre-emption. In the latter contingency "hait" includes if not "zuyut" in the sense of any field, arable or pastoral, certainly a small enclosure in the shape of a plot of homestead land, which has been and is to be utilized as a site for a house, especially when it is situated in a thickly populated area of a large town: 6 B.L.R. 41; 2 W.R. 261 and 2 B. L. R. A. C. 63, Rel. on. (*Adami and Macpherson, JJ.*) MT. SHEORATI *v.* MUNSHI LALL. **97 I. C. 618=6 Pat. 154=**
7 P.L.T. 604=A.I.R. 1926 P. 542.

Until price is known pre-emptor cannot exercise his right, but unreasonable delay in ascertaining price would destroy claim. 16 W. R. 13 (F. B.) and 35 Cal. 402 (P.C.) Foll. (*Dawson Miller, C.J. and Macpherson, J.*) TOKH NARAIN PURI *v.* RAM RACHHYA SINGH. **90 I.C. 806=7 P.L.T. 233=**
5 Pat. 96=1925 P.H. C.C. 265=A.I.R. 1925 Pat. 743.

—Succession—Custom.

——*Heirs of prostitute, even if prostitutes, are not disqualified from inheriting her.*

A custom among the prostitutes that if one of them contracts a marriage she forfeits all rights in her original family, in other words, that she becomes practically an outcaste, is opposed to public policy and is immoral and consequently unenforceable in the British Indian Courts. Even if such a custom exists and is enforceable, it does not necessarily follow therefore that the converse proposition is established that the heirs of a prostitute who has contracted marriage and has discarded the profession of the prostitutes are also disqualified from inheriting her estate even if they be prostitutes. (*Broadway and Jai Lal, JJ.*) FATEH ALI SHAH *v.* MUHAMMAD BAKHSH. **119 I.C. 258=**
9 Lah. 428=A.I.R. 1928 Lah. 516.

Where the *wajib-ul-arz* provided that a son and daughter should share equally.

Held: that it cannot be inferred from this that a daughter, in the absence of a son, will exclude a collateral. (*Ashworth and Raza, JJ.*) MT. KANIZA *v.* HASAN AHMAD KHAN. **92 I.C. 82=3 O.W.N. 114=**
1 Luck. 71=A.I.R. 1926 Oudh 231.

——*Family custom excluding females—Ordinarily whole line is excluded.*

Ordinarily in a Mahomedan family, where a custom of exclusion of females prevails, the entire female line is excluded and not only the female on account of her sex, admitting her male issue to succession. (*Dalal, J. C. and Neave, A.J.C.*) MOHAMMED HASAN *v.* ALI HAIDER. **85 I.C. 509=12 O.L.J. 1=28 O.C. 8=**
A.I.R. 1925 Oudh 337.

——*Succession to agricultural land—Qureshis of Multan—No special custom exists by which sons exclude daughters.*

There is no special custom among *Qureshis* of Multan according to which daughters in the family of the parties do not, in the presence of the sons, succeed to the agricultural land although as regards urban immoveable property they take their share according to Mahomedan Law. (*Le Rossignol and*

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Zafar Ali, JJ.) MT. HAJRA BIBI *v.* MT. JANAT BIBI.
76 I.C. 267=4 Lah. 85=A.I.R. 1923 Lah. 184.

———*Labbai Mahomedans—Females are not excluded from succession,*

Over a series of years the rights of female members of the Labbai Mahomedan community under Mahomedan Law have been repeatedly asserted and recognised and that on these occasions the rules of exclusion when pleaded, have been expressly negatived. (*Sir Lawrence Jenkins*). MAHOMED IBRAHIM ROUTHER *v.* SHAIK IBRAHIM ROWTHER.
67 I.C. 115=24 Bom. L.R. 944=45 Mad. 308=15 M.L.W. 354=26 C.W.N. 793=30 M.L.T. 85=36 C.L.J. 64=1922 M.W.N. 470=49 I.A. 119=A.I.R. 1922 P.C. 59 43 M.L.J. 69. (P.C.)

———*Daughters excluded—Presumption is that sisters and their sons are also excluded,*

When it is proved that by custom daughters are excluded from inheritance in a certain family, it may be safely assumed that sisters and their sons are also excluded. (*Dalal and Wazir Hasan, A. J. Cs,*) DILDAR HUSAIN *v.* FATEH BAHADUR. **65 I. C. 287=8 O.L.J. 554=A.I.R. 1922 Oudh 105,**

———*Wajib-ul-arz—Construction—Qarib.*

In a family of Sunni Muhammadans inheritance was governed not by the Muhammadan law but by custom which was recorded in the *Wajib-ul-arz* as follows—"*aur hissa malik mutwaffi kawoh shakhs pawega jo qarib hoga.*" *Held*: that the word '*qarib*,' as it stood alone, must be interpreted in its widest sense, *i. e.* 'near the degree, and could not be restricted in its meaning so as to be interpreted as meaning 'near in degree through the male line.' (*Lyle, A.J.C.*) NIAMAT ALI *v.* ASHIQ ALI. **67 I.C. 803=9 O.L.J. 127=A.I.R. 1922 Oudh 96.**

—Succession—Debts.

Execution of promissory note by son to pay debts of deceased father, in his own capacity and not as heir to estate—Decree obtained on such pro-note—Decree cannot affect shares of sharers and heirs of father in assets left by father. 1 All. 57 (F. B.) and 7 All. 822, Dist.; 34 All. 296, Ref. (*Mukerji and Bennet, JJ.*) MOHAMMAD KHAN *v.* MT. NASIBAN.
A. I. R. 1930 All. 592.

———*Debts of a deceased Mahomedan—Not a charge on property but provable in insolvency.*

The debts of a deceased Mahomedan do not form any charge on the property inherited by the heirs and so there can be no lien or charge on the property in the hands of the Official Receiver where Mahomedan heirs become insolvents subsequent to the decree against the estate of their ancestors in their hands and the creditors cannot claim to be secured creditors but must prove as ordinary creditors: 32 Mad. 276, Ref.; 7 All. 822 (F. B.); 18 M. L. T. 147, Rel. on.; 4 Cal. 402 (P. C.) and 40 Mad. 243 (F. B.), Cons.; A. I. R. 1927 Mad. 922, Dist. (*Odgers and Madhavan Nair, JJ.*) NAINAR ROWTHEN *v.* KUPPAI PICHAI ROWTHEN.
120 I. C. 889=1929 M. W. N. 168=A. I. R. 1929 Mad. 609.

———*Mortgage by heirs in possession for ancestor's debt—Shares of absent heirs is also liable.*

Where the heirs of a deceased Mahomedan, who were in actual possession of the estate, executed a mortgage for a debt due by the deceased, the mortgagee is entitled to enforce the mortgage against the whole estate including the shares of the heirs who did not join in the execution of the mortgage and who were not in possession, and the fact that one of the heirs brought a suit to recover his share against the mortgagors and the question was not raised in that

MAHOMEDAN LAW—Succession — Disqualification.

suit does not debar the mortgagee from enforcing the charge against the whole estate in any way: 7 All. 822 (F. B.), Foll. (*Dalal and Pullan, JJ.*) ABDUL AZIZ KHAN, *v.* MAHOMED HUSAIN. **100 I. C. 661=A. I. R. 1927 All. 415.**

———*Suit by deceased's creditor—Heirs in possession alone impleaded—Heirs out of possession are bound.*

Under the Muhammadan law suits and claims can be effectively brought by a creditor against those legal representatives of the deceased person who are in actual possession of the assets of the deceased so as to make the decree in those suits binding on all the legal representatives including those who were not made parties to the suits. (*Dalal, J. C. and Ashworth, A. J. C.*) MT. KANIZ ABBAS *v.* LALA BALA DIN.
87 I. C. 892=12 O. L. J. 37=2 O.W.N. 34=28 O. C. 177=A. I. R. 1925 Oudh 330.

So long as the debts due from the estate have not been liquidated it cannot be ascertained as to what the share of any particular heir is. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) SHYAM LAL GOKULCHAND *v.* JAMIL AHMED. **74 I.C. 487=A.I.R. 1924 Pat. 110.**

———*First charge on the estate—Sale to pay debt, if can be disputed.*

Under the Mahomedan Law, the debts of a deceased are a first charge against his estate and the heirs can only divide what remains after payment of debts. A sale by some heirs of a portion, to pay off debts cannot be disputed by the other heirs. (*Banerji and Tudball, JJ.*) MUHAMMAD JUNAID *v.* AULIA BIBI.
61 I.C. 947=42 All. 497=18 A.L.J. 613.

———*Debts left by deceased—Decree in respect of not binding on heirs not parties to decree.*

Upon the death of Muhammadan, his property immediately devolves upon his heirs in specific shares; and if there are any claims against the estate, the heirs take their shares subject to the charge of the debts of the deceased and their liability is in proportion to the extent of their shares. So a decree obtained in the litigation to which the absent heirs or those who were out of possession were not parties, cannot be executed against them or against their shares in the inherited property. 7 All. 822 F. B. Foll. (*Lindsay, J.C.*) JADUNATH SINGH *v.* MT. AFZUL KHANAN. **8 O.L.J. 191=A.I.R. 1921 Oudh 150.**

———*Transfer by person in possession of deceased's estate, for satisfaction of a decree for debts—Cannot be challenged by other heirs.*

A Mahomedan widow in possession of her deceased husband's estate can be sued for debts due from the estate without joining to the other heirs; and if she alienates any part of the estate for satisfying any decree passed in such a suit the transferee gets a good title to the property and the other heirs cannot challenge the transfer made by her. (*Maung Kin, J.*) MEHERUNNISA *v.* PEREIRA. **64 I.C. 410=10 L.B.R. 389.**

—Succession—Disqualification.

———*Murderer cannot succeed to victim's property.*

It is contrary to public policy to allow a murderer to derive from his crime the benefit of succeeding to the property of his victim, even in respect of property which would have come to the hands of the victim but for his murder. 74 P.R. 1900; 41 P.R. 1906; A.I.R. 1922 L. 293, 3 Lah. 103; A.I.R. 1922 L. 243, 3 Lah. 242 Ref. (*Abdul Raoof and Campbell, JJ.*) SHER KHAN *v.* MUHAMMAD KHAN. **83 I.C. 182=5 Lah. 117=A.I.R. 1924 Lah. 505.**

MAHOMEDAN LAW—Succession—Hanafi law.

—Succession—Hanafi law—

——*Opinion of Imam Mahomed to be preferred to that of Abu Yusuf.*

Held that in deciding the question of inheritance under the Hanafi law the Court was right in relying on the opinion of Imam Mahomed in preference to that of Abu Yusuf. *(Graham and Mitter, JJ.)* SHEIKH AKBAR ALI *v.* ADAR BIBI. **34 C.W.N. 996.**

—Succession—Law applicable.

——*Hindu convert to Shia—Faith.*

In determining the heir or heirs to the estate of a person who has renounced the Hindu religion and embraced the Shia faith of Islam recourse must be had to the shia law of inheritance and not to Act 21 of 1850 : 10 M.I.A. 511 (P.C.), Rel. on. *(Stuart, C.J. and Wazir Hasan, J.)* MITAR SEN SINGH *v.* MAQBUL HASAN. **107 I.C. 890=3 Luck. 154=4 O.W.N. 1243= A.I.R. 1928 Oudh 138.**

—Succession—Renouncing—

——*Heir can renounce right to inherit by conduct.*

According to Muhammadan law there may be a renunciation of the right to inherit and such renunciation need not be expressed but may be implied from the ceasing or resisting from prosecuting a claim maintainable against another : 17 W.R. 108, Ref. *(Pullan, J.)* MOHOMED ALI KHAN *v.* NISAR ALI KHAN. **109 I.C. 835=1 Luck. 592= A.I.R. 1928 Oudh 67.**

——*Evidence Act, S. 115—Release of interest as the heir of father no bar to a claim to inherit a share after the brother's death.*

Plaintiff at the time of partition with his brothers for a certain sum of money released his share in his father's property in favour of his brothers. On the death of brother (one of the releasees) he sued for his share. The deed of release ran as follows : "Said releaser (plaintiff) for himself, his heirs, executors and administrators relinquishes all his right, title and interest in and to the firm of "M. Hakimji" and all the remaining moveable and immovable properties hereunto jointly owned and possessed by the said releasor and the said releasees (his brothers) or to the ownership or possession of which they may now or hereafter be entitled as heirs of the late Seth Mamoonji and proprietors of the said firm of M. Hakimji." *Held*: it is clear that what the plaintiff was relinquishing was only his claims as an heir of his deceased father and as joint owner of the firm M. Hakimji. Had it been his intention to give up any future right of inheritance that might accrue to him from the death of one of the releasees this would have been expressed in the deed. Plaintiff was not estopped by the deed of release. Halsbury's Laws of England Vol. X, page 461, Foll. 20 Cal. 373, Dist. *(Martineau and Campbell, JJ.)* YUSUF ALI *v.* ALI BHOY. **83 I.C. 170= A.I.R. 1923 Lah. 8.**

—Succession—Right to—Step-son.

A step-son does not appear at all to be an heir. *(Bhide, J.)* ALLAH BAKSH *v.* MUHAMMAD UMAR **115 I.C. 479= A.I.R. 1929 Lah. 444.**

Son's daughter's son succeeds as distant kindred in preference to person having undefined relationship. *(Tekchand and Agha Haidar, JJ.)* INAYAT *v.* MT. BHARAI. 31 P.L.R. 1907 F.B. Foll. **109 I.C. 255= 9 Lah. 180=29 P.L.R. 8=A.I.R. 1928 Lah. 291.**

——*Brother's daughters exclude their pre-deceased's sister's descendants.*

Under Mahomedan Law, daughters of a deceased brother exclude the descendants of their sister who die during the lifetime of the deceased : A.I.R. 1922 Lah. 217 Dist. *(Addison, J.)* SHAHAB DIN *v.* UMRAN. **94 I.C. 148=A.I.R. 1926 Lah. 440.**

MAHOMEDAN LAW—Succession—Widow.

——*Shiahs—Daughter's children and descendants are not excluded by agnatic collaterals—Direct heir disqualified—Succession by next heir is not barred.*

Under the Shiah Law daughter's children and descendants are not excluded from inheritance in favour of agnatic collaterals ; nor does a disqualifying cause which excludes the direct heir from taking the inheritance form a bar, under the Mahommedan Law, to the succession of the next heir, the heir presumptive. The grand-daughter is thus as much a "legal heir" under the Shiah Law as the daughter. *(Mr. Ameer Ali.)* BIBI AKHTARI *v.* DILJAN ALI. **71 I.C. 621= 32 M.L.T. 180=18 M.L.W. 193=28 C.W.N. 545= 1923 M.W.N. 793=4 L.R.P.C. 90= A.I.R. 1923 P.C. 11=45 M.L.J. 359.**

—Succession—Rules of.

——*Rule of propinquity.*

The rule of propinquity may apply as between the members of a class, but it does not apply as between classes. Where therefore a person is a residuary of the propositus he does not lose his rights as such residuary merely because he also possessed relationship with the propositus through another person. *(B. B. Ghose and Page, JJ.)* SAREFUDDIN MAHOMED *v.* MOHIUDDIN MAHOMED. **105 I.C. 67=54 Cal. 754= 31 C.W.N. 1068=A.I.R. 1927 Cal. 808.**

—Succession—Shares.

One S. K. left three grandsons by a pre-deceased son who were defendants 1 to 3, two daughters and a brother M. K. *Held*, that the daughters got two-thirds share and defendants 1 to 3 got one-third share. *(Lindsay and Kanhaiya Lal, JJ.)* MUBARAK UN-NISSA *v.* MUHAMMAD RAZA. **79 I.C. 174= 46 All. 377=22 A.L.J. 307=5 L.R.A. (Civ.) 257= A.I.R. 1924 All. 384.**

——*Death of heir before distribution—Latter's share goes to his heirs.*

Under Muhammadan Law, a "vested inheritance" is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to his heirs at the time of his death. The shares have to be determined at each death. *(Scott-Smith and Harrison, JJ.)* MT. JAWAI *v.* HUSSAIN BAKSH. **67 I.C. 154=3 Lah. 80= A.I.R. 1922 Lah. 298.**

—Succession—Transfer of—

——*Right of inheritance before vesting—Not transferable.*

Rights of inheritance only arise after the death of the person whose estate is in question. A Mahomedan cannot renounce his right of inheritance before that right had become vested by the death of the person to whom he is entitled to succeed. 41 Mad. 365; 31 Bom. 165 Foll. *(Kincaid, J. C. and Raymond, A. J. C.)* MT. BHAGHARI *v.* MT. KHATUMAL, **80 I.C. 118=16 S.L.R. 25= A.I.R. 1921 Sind 177.**

—Succession—Widow.

——*Shia Law—Childless widow is entitled to one-fourth share in the moveables.*

Under Shia law a childless widow is entitled to one-fourth share in the moveables including household effects and the value of trees and buildings forming part of her husband's estate. *(Dawson Miller, C.J., and Adami, J.)* ALI ZAMIN *v.* MD. ALI AKBAR ALI KHAN. **116 I.C. 525=7 Pat. 426=9 P.L.T. 699= A.I.R. 1928 Pat. 441.**

MAHOMEDAN LAW—Succession—Widow.

———*Shiah law—Childless widow is not entitled to a share in the land but she takes a share in the sale proceeds of buildings.*

A childless widow of a Shia is not entitled to a share in the value of any land belonging to her husband including land which constitutes the sites of buildings, but she is entitled to a share in the proceeds of a sale of buildings: 25 Cal. 9 (P.C.), Foll. (*Mears, C. J., and Lindsay, J.*) DURGADAS *v.* MD. NAWAB ALI KHAN. **95 I.C. 19=48 All. 557=A.I.R. 1926 All. 522.**

———*Shiah Law—Usufructuary mortgages in favour of a Shiah —Widow is entitled to her share in the debt.*

Usufructuary mortgages executed in favour of a deceased Mahomedan do not constitute immovable property in the sense of land, so as to disentitle his widow to any share in such property. She is entitled to her proper share in all debts which were owing to her deceased husband whether these debts were secured by usufructuary mortgages or otherwise. (*Mears, C.J., and Lindsay, J.*) DURGADAS *v.* MD. NAWAB ALI KHAN. **95 I.C. 19=48 All. 557=A.I.R. 1926 All. 522.**

—Divorce pronounced in death-illness—Husband dying before completion of Iddat—Wife is entitled to inherit.

If a divorce is pronounced in death illness and the husband dies before the completion of the wife's Iddut the wife as entitled to inherit to him. (*Kincaid, J.C., and Raymond, A.J.C.*) MT. BHAGHARI *v.* MT. KHATUMAL.

80 I.C. 118=16 S.L.R. 25=A.I.R. 1921 Sind 177.

—Texts—

———*Difference in opinion between Abu Hanifa and Abu Mahomed.*

If Abu Hanifa does not agree with Mahomed, the opinion supported by Abu Usuf should prevail. (*Chari and Mya Bu, JJ.*) ASHIA KHATOON *v.* ABDUL HAKIM MAISTRY. **120 I.C. 129=A.I.R. 1929 Rang. 189.**

———*Difference of opinion between different jurists—Traditions need not be examined—Opinions of recognized jurists will prevail.*

When there is difference of opinion among the jurists the point in dispute cannot be decided by Courts sitting so many centuries afterwards by the examination of traditions only. Reliance must be placed on the opinion of recognized jurists who alone could have undertaken the task of sifting the traditions and, in case of divergence, on their comparative superiority. (*Sulaiman and Mukerji, JJ.*) AZIZ BANU *v.* MOHAMMAD IBRAHIM. **89 I.C. 690=47 All. 823=23 A.L.J. 768=A.I.R. 1925 All. 720.**

Shiah Law—*Sharaya-ul-Islam* is most authoritative. 14 All. 429 (F. B.) Rel. on. (*Sulaiman and Mukerji, JJ.*) AZIZ BANU *v.* MAHOMMAD IBRAHIM. **89 I.C. 690=47 All. 823=23 A.L.J. 768=A.I.R. 1925 All. 720.**

———*Interpretation of a precept by a great jurist should be followed without referring to earlier authorities.*

Per *Dalal, J. C.*—When once a great Mahommedan Jurist has interpreted a particular precept of Mahomedan Law in a particular way that interpretation should be followed without referring back to original authorities. That is the only method of making the Mahomedan or Hindu Law certain when administered by Indian Courts. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) IMDAD ALI *v.* AHAMAD ALI. **85 I.C. 400=28 O.C. 55=A.I.R. 1925 Oudh 518.**

———*Law, ascertainment of—Private judgment and deductions are proper methods.*

MAHOMEDAN LAW—Wakf—Alienation.

That private judgments and analogical deduction are in appropriate circumstances and to a greater or lesser extent legitimate methods of ascertaining the law, is recognised in the Text Books. (*Oldfield and Krishnan, JJ.*) NARANTAKATH AVULLAH *v.* PARAKKAL MAMMU. **71 I.C. 65=45 Mad. 986=16 M.L.W. 626=1922 M.W.N. 662=24 Cr.L.J. 17=A.I.R. 1923 Mad. 171=43 M.L.J. 663.**

—Wakf—
Alienation.
Construction.
Creation of.
Cypres.
Delivery of Possession.
Effect of.
Illusory.
Law applicable.
Lease.
Management.
Mosque.
Mutwali.
Object of.
Private.
Proof of.
Religious Office.
Sajjadanashin.
Subject of.
Validity.
Who can create.
Miscellaneous.

—Wakf—Alienation—

———*Inalienability is not absolute—Sale by mutwali is valid during his lifetime.*

Though wakf property vests in God and that property is inalienable except for the purposes of the wakf the inalienability is not absolute and a sale by a mutwali is valid during his lifetime provided he has a beneficial interest in the property: A.I.R. 1922 P. C. 123; A.I.R. 1926 P. C. 9 and A.I.R. 1923 P. C. 44, Foll. (*Wallace and Anantakrishna Ayyar, JJ.*) VENKATASUBBARAYUDU *v.* SILAR SAHIB. **31 M.L.W. 396=A.I.R. 1930 Mad. 582=58 M.L.J. 524.**

———*Sale of wakf property—Adverse possession when begins,*

There is no difference between a permanent lease and a sale of wakf property and where a sale by the mutwali of such property is valid during his lifetime, adverse possession against the mosque commences not from the date of sale but from the date of the death of the mutwali: A.I.R. 1922 P.C. 123; A.I.R. 1925 Mad. 822; A.I.R. 1927 Mad. 1163; A.I.R. 1926 Pat. 239, Foll. A.I.R 1922 Pat. 243; A.I.R. 1926 P.C. 9; A.I.R. 1923 P.C. 44 Ref. (*Wallace and Anantakrishna Ayyar, JJ.*) VENKATASUBBARAYUDU *v.* SILAR SAHIB. **31 M.L.W. 396=A.I.R. 1930 Mad. 582=58 M.L.J. 524.**

———*Cemetry cannot be alienated.*

Once land has been dedicated for the purpose of a cemetry it must always be regarded as cemetry, unless for any reason the land turns out to be unfit for use as a cemetry and consequently is incapable of alienation. Oudh First Appeal No. 15 of 1921 Expl. (*Srivastava, J.*) ABDUL GHAFOOR *v.* RAHMAT ALI. **122 I.C. 326=7 O.W.N. 382=A.I.R. 1930 Oudh 245.**

———*Civil Court can entertain application for sanction to transfer wakf property—District Judge takes place of Qazi of day of old.*

Under Mahomedan Law wakf property cannot be transferred without the sanction of the Qazi. In olden

MAHOMEDAN LAW—Wakf—Alienation.

days the Qazi could sanction transfer of wakf property only while exercising civil powers. Naturally, therefore, in the present day, the mutwalli has to go to a civil Court to obtain the sanction and the District Judge has jurisdiction to entertain such application: A.I.R. 1924 Cal. 473, Rel. on. (*Mukerji and Iqbal Ahmed, JJ.*) ASKARI HUSAIN *v.* L. CHUNNI LAL **1930 A.L.J. 205=A.I.R. 1929 All. 849.**

——*Sale may be supported on ground of necessity—Sanction of Court if necessary can be given retrospectively if necessity is proved.*

A sale of the wakf property by the mutwalli may be supported on the ground of necessity, although necessity cannot be proved for the whole of the amount of the purchase money; and although sanction of the Court is advisable for the sale, such sanction can be given retrospectively if necessity is proved. (*Banerji and Weir, JJ.*) MUHAMMAD SHAFIQ AHMAD *v.* MUHAMMAD MUJTABA. **111 I.C. 93=51 All. 30=26 A.L.J. 1016=A.I.R. 1928 All. 660.**

——*Permanent lease of wakf property by mutawali is void.*

A permanent lease by a mutwalli of wakf property is void. Such a lease cannot be enforced even to the extent to which the mutawalli could have validly leased: 4 L.W. 74; 37 Cal. 179; and 31 Mad. 125, Diss. from.; A.I.R. 1917 P.C. 33; A.I.R. 1923 P.C. 205; 5 W.R. (Civil) 158; and A.I.R. 1925 Cal. 435, Rel. on. (*Kumaraswami Sastri, J.*) HANUMANTHU *v.* KRISHTABRAHMAN. **104 I.C. 345=26 M.L.W. 202=A.I.R. 1927 Mad. 829.**

—Mutwalli—Mutwalli cannot create leasehold interest unless authorized by Kazi—Lessee does not acquire adverse possession against succeeding Mutwalli but a new tenancy is created if the succeeding Mutwalli recognizes his interest. A.I.R. 1922 P.C. 123 Appl. (*Greaves and Mukerji, JJ.*) JABEDAKHATUN *v.* MOHOMMAD MOZAFFAR ALI. **90 I.C. 781=30 C.W.N. 807=A.I.R. 1926 Cal. 322.**

——*Mutwalli cannot alienate* Waqf *property except for* Waqf *necessity—Alienee must prove necessity.*

A Mutwalli has no power under the Mahomedan Law to mortgage or transfer the *Waqf* property or any portion of it without the leave of the *Kazi* or the Court. Such a transfer is under the law void. (A.I.R. 1923 P.C. 44, Foll.)

The curator of a *Waqf* whether called Mutwalli or Sajjadanashin or by any other name, is merely a manager. Where an attempt is made to grant a mortgage for purposes foreign to the necessary purposes of the *Waqf*, which is therefore as such unsustainable, the whole mortgage fails; for an advance of money otherwise then to satisfy the legitimate needs and purposes of *Waqf*, no part of the property held in *Waqf* is chargeable either by the settlor or by the Court. In the case of alienation the alienee has to prove the existence of necessity. (*Suhrawardy and Chotzner, JJ.*) MAHIMJAN BIBI *v.* MIR RAHIM ALI. **79 I.C. 360=A.I.R. 1925 Cal. 435.**

——*Sanction to lease* waqf *property by application to District Judge.*

District Judge has jurisdiction to authorise dealings with *wakf* property in the same way as a kazi might have done under the Mohamadan Law and the sanction given by him on an application by the mutwalli is sufficient authority for the mutwalli for letting out the property. It is not necessary to bring a suit for obtaining such sanction. It will be granted upon a proper application being made by the mutwalli. (36 Cal. 21, 37 Cal. 179, 43 Cal. 1085 (P.C.), 5 Bom. 154, Foll.; 37 Cal. 870, Not Foll.; 23 C.W.N. 132, Expl.) (*Mookerjee and Panton, JJ.*) HABIBAR RAHMAN *v.* SAIDANNESSA BIBI, **77 I.C. 943=51 Cal. 331=38 C.L.J. 363=A.I.R. 1924 Cal. 473.**

——*District Judge can authorise muttawallis to lease* wakf *property.*

It is well settled in Calcutta High Court that mutwallis may be authorised to execute leases by the District Judge who for this purpose, is competent to discharge the functions of Kazi under the Mahomedan law. (3 C. W. N. 158; 37 Cal. 870; and 24 C. W. N. 339, Foll.) (*Mookerjee and Panton, JJ.*) HABIBAR RAHAMAN *v.* SAIDANNESSA BIBI. **77 I.C. 907=38 C.L.J. 358=A. I. R. 1924 Cal. 327.**

——*Alienation and partition of takia property is void.*

A takia is a resting place and usually is in the keeping of a faqir and its common features are a rough mosque which is generally nothing more than a mud or loose masonry prayer platform and attached thereto generally a small hut or shed for the purpose of the ablutions enforced by the Islamic tenets before prayers are said. It is also a general meeting place for the exchange of news and gossip and for smoking tobacco. In short it is the primitive substitute of unsophisticated and indigent India for a club. The presence of the prayer platform or mosque and bathroom is due to the frequency of prayer enjoined upon Muhammadans by their religious law and even if the takia be not regarded as a *wakf* property it is obviously a common property set aside for common enjoyment and consequently not a property which may be usurped with impunity by a few of the persons interested and by them diverted to uses which render the original dedication impossible. The takia property is therefore inalienable and impartible except with the consent of all the persons interested. (*Le Rossignol and Zafar Ali, JJ.*) DIN MAHAMMAD *v.* PIR BAKHSH. **76 I.C. 259=A.I.R. 1924 Lah. 652.**

——*Mortgage not for purposes of* Wakf *is invalid even in respect of the property settled for benefit of family.*

Where an attempt is made to grant a mortgage for purposes foreign to the necessary purposes of the *Waqf* the whole mortgage fails. It cannot for purposes of enforcement be severed into two distinct charges one declared for pious uses on one part of the property and another, declared on another part for the use of the mortgagor only. The property itself is not to be regarded as severable and chargeable according to the measure of the interest which the settlor's family may have in the rents and profits of the whole. (*Lord Sumner.*) ABDUR RAHIM *v.* NARAYAN DAS. **71 I.C. 646=17 M.L.W. 509=50 I.A. 84=32 M.L.T. 153=25 Bom. L.R. 670=1923 M.W.N. 441=50 Cal. 329=38 C.L.J. 242=28 C.W.N. 121=A.I.R. 1923 P.C. 44=44 M.L.J. 624.**

——*Lease by* mutwalli *for more than three years is voidable.*

It is well settled that a *mutwalli* should not leave *wakf* property if it be agricultural for a term exceeding three years and, if non-agricultural, for a term exceeding one year, unless he is expressly authorized by the deed of *wakf* to do so or, where he has no such authority, unless he has obtained the leave of the Court to do so. Where the *mutwalli* purports to grant a lease for a longer term than a year or three years respectively, it is not void but voidable. (*Mookerjee and Cuming, JJ.*) GAJENDRA NATH DEY *v.* MOULVI ASHRAF HOSSAIN. **69 I.C. 707=36 C.L.J. 48=27 C.W.N. 159=A.I.R. 1923 Cal. 130.**

MAHOMEDAN LAW—Wakf—Alienation.

———*Alienation by Mutwalli—Necessity—Debt existing for a long time does not prove necessity.*

It is for the plaintiff to make out necessity and the mere fact that there has been a debt outstanding for a long time is not a circumstance going to show that when the debt was first incurred it must have been for a purpose which would bind the trust. (*Phillips and Devadoss, JJ.*) JAGGA ROW *v.* GORI BIBI.

72 I.C. 789=17 M.L.W. 521=1923 M.W.N. 347= A.I.R. 1923 Mad. 545.

———*Mutwalli has power to grant long leases for necessary purposes.*

Under the Mohammadan Law a Mutwalli may grant leases for more than a year of house property belonging to a trust if it is deemed necessary for the benefit of the trust estate. (*Lindsay and Kanhaiya Lal, JJ.*) BAIJNATH *v.* MOHAMMAD ISMAIL.

68 I.C. 764=20 A.L.J. 697=44 All. 677= A.I.R. 1922 All. 417.

———*Minority of* Mutwalli—*Proceedings for appointment of temporary Mutwalli pending—Court has seisin of estate and can grant lease of it.*

Where the Court had seisin of the estate by virtue of the proceedings which had been instituted before it for the appointment of a temporary *Mutwalli* who would manage the properties during the infancy of the permanent Mutwalli,

Held, that the Court was not only competent but bound to make suitable arrangements for the upkeep and administration of the estate in his custody and a lease granted by an Officer of the Court, who had been appointed Receiver, would be an act of the Court in the exercise of its jurisdiction and must accordingly be pronounced valid and operative irrespective of the validity of the appointment of the Receiver. (*Mookerjee, A.C.J. and Fletcher, J.*) BIPIN BEHARI *v.* CHARU CHANDRA. **60 I.C. 753=35 C.L.J. 192= A.I.R. 1921 Cal. 816.**

———*Minor female* Mutwalli—*Her husband cannot act as* Mutwalli *and cannot lease* wakf *estate—Such lease is void.*

The husband of a minor female *Mutwalli* has, under the Muhammaean Law, no authority to act as *Mutwalli* of the *Wakf* estate, and any lease of that estate granted by him is void and not voidable. *Governors of Magdalen Hospital* v. *Knotts*, (1879) 4 A. C. 324; 36 Cal. 1003; 5 C. L. J. 62; 36 Cal. 675; 19 C. L. J. 360; 17 C. W. N. 873 and 38 Cal. 526, **Foll.** 33 Cal. 511 held overruled by 36 Cal. 1003. (*Mookerjee, A. C. J. and Fletcher, J.*) BIPIN BEHARI *v.* CHARU CHANDRA, **60 I.C. 753=35 C.L.J. 192= A.I.R. 1921 Cal. 816.**

—Wakf—Construction.

———*Terms of wakfnama—Absolute dedication of properties—Directions for expenses of mosque.*

Where a wakfnama provided that certain expenses of a mosque were to be met out of certain properties and though there was no direction as to the appropriation of the residue the deed contained a clause that the executant and her heirs had no manner of right to the properties and it also provided that such compensation money as may be paid by Government or its acquiring the wakf property should be impressed with the trust, *held*, that there was an absolute dedication of the properties and that the provisions as to expenses were mere directions to the mutawallis. (*Mukerji and Guha, JJ.*) DEBENDRA NATH SADHUKHAN *v.* NOHARMAL JALAN. **34 C.W.N. 438=51 C.L.J. 547,**

———A deed of wakf provided as follows: "During my lifetime, the Tauliat of the entire wakf properties, noted in Schs. 1 and 2, shall have concern with me personally. During my lifetime, I shall keep the entire wakf properties in my possession and under my management as mutawalli, and carry out the Tauliat work. During my lifetime no one shall have absolutely any power to interfere with and raise an objection regarding the right of Tauliat or the management of the properties. I, the Mutawalli, too shall spend money in whatever manner I would like.

In order to bring this wakfnama into force it will be incumbent upon me to get my name removed as a proprietor and to get it registered in the Government office as a Mutawalli of the wakf properties specified in Sch. 1. Similarly the future Mutawallis also shall do the same.

Should any Mutwalli, besides myself, give up the Isna-Ashari sect of the Shia school or prove dishonest, the committee shall have power to remove him and to select another Mutawalli according to the terms of this wakfnama.

During my lifetime I shall, as a Mutawalli, carry on the entire work relating to the wakf according to my own personal choice. I have nominated and appointed the said S, a Mutawalli. Therefore, his name shall be registered in the Government, Municipal and other offices along with my name. But during my lifetime the powers of Tauliat shall be exclusively possessed by me, while the name of the said S. Mutawalli, shall be recorded along with my name in every action that will be taken. During my lifetime the said Mutawalli, shall not have the power to take any action independently. But the said Mutawalli shall comply with my orders in conducting the business for which an order will be passed by me. The name of the said Mutawalli shall be registered in the Government offices, so that it may be thoroughly publishad (well known to all) and no one may raise any dispute in future regarding the Tauliat right of the said Mutawalli. On my death the said Mutawalli shall possess full power in the same way in which it is possessed and shall be possessed by me during my lifetime."

Held: that the deed did not necessarily purport to retain in the wakif any proprietary rights in the property. (*Dawson Miller, C. J. and Adami, J.*) ALI LAMAN *v.* MD. AKBAR ALI KHAN. **7 Pat. 426= 9 P.L.T. 699=A.I.R. 1928 Pat. 441.**

———*Reservation of a life-interest to the wakf—Does not invalidate wakf.*

The parties were Zerbaddi Sunnis of Mandalay. The wakfnamah expressly stated that the teaching of "Imam Abu Jusuf" had been relied upon in drawing it up. One of the clauses specifically showed that the whole intention of the wakif was that neither he, nor his heirs and successors after his death, should be able to sell, mortgage, or otherwise alienate any interest in the *corpus* of the property concerned in the wakf. Another clause reserved to the wakf, as Mutwalli, the occupation of the property up to his death, and the usufruct of the rents and profits of the property, after paying for necessary repairs, extensions, or improvements and paying taxes and monthly subscriptions and expenses for his meritorious and charitable acts. In this clause he expressly made himself the Mutwalli, as was usual in Zerbaddi wakfs in Mandalay.

Held: the reservation of the wakf's life-interest in the property does not clash with the conception of a valid wakf, provided the *corpus* of the property is, there and then definitely and finally appropriated to the intended purpose, *i.e.*, to the service of God. The wakfnamah indicated that this was the case here.

Held, further, that as the wakif was made after the passing of the Mussalman Wakf Validating Act of 1913, which it was also held, as regards Sunni Mohamedans, subject to the Hanafi Law, *must* be taken to

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have reaffirmed the view, that decisions in India are primarily given according to the tenets of Inam Abu Jusuf, and not according to Imam Mahomed, there was nothing fatal to the wakfnamah in the clause. *(Duckworth and Godfrey, JJ.)* MA E KHIN *v.* MAUNG SEIN. **88 I.C. 167=2 Rang. 495= A.I.R. 1925 Rang. 71.**

———*Distinct arrangements to be followed during settlor's lifetime and after his death—Wakf held to be not testamentary.*

Where the dedication is complete, the frequent reference to the arrangements to be followed during his lifetime as distinct from those to be followed afterwards does not make the wakf testamentary wakf. *(Duckworth and Godfrey, JJ.)* MA E KHIN *v.* MAUNG SEIN. **88 I.C. 167=2 Rang. 495= A.I.R. 1925 Rang. 71.**

———*Mere use of the word wakf in a deed—Does not make it a wakf.*

Under the terms of the deed named persons were to take the property becoming owners thereof immediately and they and their descendants after them were to enjoy the property for ever without any power to alienate. The word *waqf* was used in more than one place by the executant in describing the document itself. But otherwise it was expressly and in terms a gift to three specified persons.

Held: the mere use of the word "*waqf*" in a deed does not make it a *waqf*. *(Mears, C. J. and Piggott, J.)* MAHOMED AFZAL *v.* MUHAMMAD MAHMOOD. **74 I.C. 343=21 A.L.J. 595= 4 L.R.A. Civ. 314=A.I.R. 1924 All. 28.**

A *wakf* provided, "In the event of slackness, negligence or discovery of misappropriation on their part, I or my heirs shall be at liberty to dispense with the services of the said mutwalli, and in case of death or dismissal of any mutwalli, if any heir belonging to the Imamia sect and competent enough to administer the *wakf* property be not left to the mutwalli, the naib mutwalli shall succeed him, as mutwalli, and naib mutwalli shall be appointed from among his (naib-mutwalli's) heirs. In the event of no heir of the mutwallis and the naib-mutwalli being found fit to manage the *wakf* property, selection shall be made of a competent person from among the heirs of me, the executant. If, God forbid, no heir of mine near or remote be found, the authorities for the time being shall be competent to appoint a suitable person belonging to the Imamia sect to administer the *wakf* property mentioned above. But so long as the mutwallis and the naib-mutwalli aforesaid shall manage the affairs of the *wakf* estate faithfully and efficiently, no one shall question the tenure of the offices by the mutwallis or be competent to complain (urge their dismissal, nor shall they be dismissed) unless the complaint is substantiated before the authorities for the time being."

Held, it is only in the event of no heir of the mutwalli and the naib-mutwalli being found fit to manage *wakf* property, that selection is to be made of a competent person from among the heirs to the *wakf*. *(Mr. Ameer Ali.)* BIBI AKHTARI *v.* DILJAN ALI. **71 I.C. 621=32 M.L.T. 180=18 M.L.W. 193= 28 C.W.N. 545=1923 M.W.N. 793= 4 L.R.P.C. 90=A.I.R. 1923 P.C. 11= 45 M.L.J. 359 (P.C.).**

—Wakf—Creation of—Admission.

The admission of execution cannot operate to create a wakf. *(Ross and Chatterji, JJ.)* MUHAMMAD IBRAHIM *v.* BIBI MARIAM. **117 I.C. 638= 8 Pat. 484=A.I.R. 1929 Pat. 410.**

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—Wakf—Creation of—Essentials.

———*Permanency.*

Once a wakf is established either by evidence of dedication or by evidence of user, it is of the essence of the wakf that it should be permanent. *(Srivastava, J.)* ABDUL GHAFFAR *v.* RAHMAT ALI. **122 I.C. 326=7 O.W.N. 382= A.I.R. 1930 Oudh 245.**

———*Conditional grant does not constitute wakf.*

A grant *sub conditione* cannot be considered to be a wakf. It is not necessary in order to constitute a wakf that the term "wakf" be used, if from the general nature of the grant itself that tenure can be inferred. 2 M.I.A. 390, Foll, *(Lord Shaw.)* MAHOMED RAZA *v.* SYED YADGAR HUSSAIN. **80 I.C. 645= 21 N.L.R. 1=1924 M.W.N. 447=28 C.W.N. 937= 51 I.A. 192=20 M.L.W. 3=7 N.L.J. 116= 51 Cal. 446=34 M.L.T. 83=5 L.R. P.C. 76= A.I.R. 1924 P.C. 109 (P.C.).**

———*Shia Law—*

Among Shias there are four essential requisites on which depends the validity of the *wakf*: (1) that it must be perpetual, (2) it must not be contingent, (3) that possession must be given of the thing dedicated or more properly the properties should cease to be the properties of the donor, and (4) that the right of the donor should be entirely divested therefrom. It is, however, recognized in Shia law that it is lawful for the *wakif* to constitute himself or herself the *mutwalli* and that in such a case a formal change of possession is out of the question and that all that is required is not actual delivery of possession but change in the character of possession. If the *wakif* continues to exercise his right over the *wakf* property and makes no change in the character of his possession the *wakf* will not take effect. Transmutation of possession or (which is the same thing) change in the character of possession is essentially a matter of evidence and can only be decided on the evidence in the case. *(Das and Adami, JJ.)* MT. BIBI KANIZ ZAINAB *v*, SYED MOBARAK HOSSAIN. **72 I.C. 748= A.I,R. 1924 Pat. 284.**

—Wakf—Creation of—Implication.

———*Facts insufficient to prove creation of waqf.*

A house with a court-yard was claimed to have been waqf property. The court-yard was known an imambara, majlises were held on it at the time of Moharrum and Chehlum, tazias used to be kept in it in front of the dalan and a number of graves were to be found in different portions of the property.

Held: that a Court is not bound to hold from these facts that house was dedicated according to Shia law. *(Ashworth and Sen, JJ.)* SHAH ALI HAMMAD *v.* MD. NAZIR ALI. **116 I.C. 18=1929 A.L.J. 517= A.I.R. 1929 All. 329.**

———*Term "Waqf" not necessary—Inference can be drawn from general nature of grant.*

It is not necessary, in order to constitute a wakf, that the term "wakf" be used, if from the general nature of the grant itself, that tenure can be inferred. A.I.R. 1924 P.C. 109 and A.I.R. 1928 Oudh 241, Foll. *(Srivastava and Gokaran Nath Misra, JJ.)* MD. WAZIR KHAN *v.* MD. HUSSAIN. **111 I.C. 805= A.I.R. 1929 Oudh 65.**

———*Intention essential—Specific word "Wakf" not necessary to constitute valid wakf.*

When the intention to make a wakf is apparent, or can be inferred from the general tenor of the deed, or from the conduct of the donor or from the nature of the object in favour of which the grant is made or from surrounding circumstances at large, it will

MAHOMEDAN LAW—Wakf—Creation of—Implication.

constitute a valid and binding wakf, though the word "wakf" might not have been used.

A certain document purporting to be wakfnama was incomplete, the first page being missing. It was unattested. Evidence justifying the fact that it was read and explained to the purdanashin woman executing it was very unsatisfactory. The deed was not signed by the alleged scribe nor did the scribe make the endorsement that the contents were read and explained. Subsequent to the execution of alleged deed part of the property dedicated was mortgaged. Evidence did not suggest that there was any intention to create a wakf by word of mouth on the date when the deed was executed.

Held: that there was no reasonably clear declaration of dedication, the deed was not admissible to supply the defects of evidence, and the circumstances did not indicate even a clear intention to create a wakf. (*Ross and Chatterji, JJ.*) MUHAMMAD IBRAHIM *v.* BIBI MARIAM. **117 I.C. 638=8 Pat. 484=A.I.R. 1929 Pat. 410.**

———*Mere intention not sufficient—There must be a clear declaration from which creation may be presumed.*

A wakf can be created either verbally or in writing. The law will give effect to a dedication in whatever language it may be expressed or in whatever terms the wish may be formulated. There must, however, be a declaration of endowment. Even if the word "Wakf" may not be used there must be at least a clear declaration from which the creation of a wakf may be presumed. The use of any express term or phrase is not necessary for the validity of a wakf. But a mere intention to set apart the property for a charitable purpose is not sufficient to create a wakf. A.I.R. 1922 Cal. 429, 31 Bom. 250, Foll. (*Ross and Chatterji, JJ.*) MUHAMMAD IBRAHIM *v.* BIBI MARIAM. **117 I.C. 638=8 Pat. 484=A.I.R. 1929 Pat. 410.**

——Easements Act, S. 18—One or two persons allowed to be buried on a particular spot—No evidence of dedicating the spot to the community—Spot does not assume public character. (*Rutledge, C. J. and Brown, J.*) L. DAWSON *v.* PRINCESS ROUNIA ZAMANI BEGUM. **112 I. C. 431=6 Rang. 456=A. I. R. 1928 Rang. 268.**

———*The word "wakf" need not necessarily be used—Intention to set apart property for pious object is sufficient.*

In order to constitute a wakf, it is not necessary to use the word "wakf". So long as it appears that the intention of the donor was to set apart specific property or the proceeds thereof for the maintenance or support in perpetuity of a specific object or a series of objects recognized as pious by the Musalman Law, it amounts to a valid and binding dedication. 19 Cal. 203 and 2 M.I.A. 390, Rel. on; A. I. R. 1924 P.C. 109, Dist. (*Wazir Hasan and Gokaran Nath Misra, JJ.*) SHAH MD. NAIM ATA *v.* MD. SHAMSHUDDIN. **100 I.C. 241=2 Luck. 109=4 O.W.N. 116=A. I. R. 1927 Oudh 113.**

———*No formality nor particular phrase is necessary for its creation.*

For the constitution of a wakf, there is no essential formality or necessity for the use of any express phrase or term. (*Findlay, O. J. C.*) MIR MARDAN ALI *v.* ZARIM KHAN. **93 I.C. 382=A.I.R. 1926 Nag. 331.**

A dedication for religious purpose can be implied and need not be express. (*Le Rossignol and Broadway, JJ.*) UMAR DIN *v.* MST. AISHAN. **4 L. L. J. 528=A. I. R. 1921 Lah. 303.**

MAHOMEDAN LAW—Wakf—Creation of—User.—Wakf—Creation of—Mode of.

———*Verbal declaration issufficient—Settlor would be presumed Mutwali—Object would be presumed to be charity.*

A verbal declaration of the intention to create an endowment is sufficient to create a wakf if made in the presence of witnesses. Although the witnesses to the fact depose vaguely, yet their evidence, if corroborated by circumstances, is legally sufficient. The wakif need appoint no Mutwalli. He is presumed himself to be the Mutwalli. The appointment of a Mutwalli is not essential to the validity of an appropriation. Further it is not necessary for the wakif to declare his object. This will be assumed to be for religion and charity. Delivery of possession to others, as Mutwallis, also is not essential. (*Duckworth and Godfrey, JJ.*) MA E KHIN *v.* MAUNG SEIN. **88 I. C. 167=2 Rang. 435=A.I.R. 1925 Rang. 71.**

———*Saint buried—Urs held without demur—Wakf is not created.*

The mere burial of a saintly person in a plot of land does not convert that land into trust property, in spite of the circumstances that urs was held there for a few years without any demur by defendants-proprietors. 107 P.R. 1917, Foll. (*Shadi Lal, C.J. and Fforde, J.*) ALI MUHAMMAD KHAN *v.* ALI AKBAR KHAN. **73 I. C. 613=4 Lah. 133=80 I.C. 765=A.I.R. 1924 Lah. 58.**

———*Two forms Sadakah and Wakf.*

Under Muhammadan Law, a gift for charity may take two forms, *viz.*, either by way of *wakf*, which signifies an endowment, or else by way of *sadakah*, which signifies a donation. (*Marten, J.*) ADVOCATE-GENERAL, BOMBAY *v.* YUSUFALI EBRAHIM. **84 I. C. 759=24 Bom L. R. 1060=A. I. R. 1921 Bom. 338.**

—Wakf—Creation of—Mutation.

———*Absence of mutation in revenue records is not very material.*

There is not the same strong reason for a mutation being effected when land is made wakf as exists in the case of a transfer of land to an individual, who is interested in protecting his title. Hence absence of mutation in the revenue records may be immaterial in the face of other evidence showing that dedication was made publicly. (*Broadway and Martineau, JJ.*) RAHIM BAKHSH *v.* CHANAN DIN. **4 L.L.J. 511=A.I.R. 1921 Lah. 390.**

—Wakf—Creation of—User.

It is well settled that a wakf may, in the absence of direct evidence of dedication, be established by evidence of user. (*Srivastava, J.*) ABDUL GHAFOOR *v.* RAHMAT ALI. **122 I. C. 326=7 O.W. N. 382=A.I.R. 1930 Oudh 245.**

———*Evidence of user up to present day is not necessary.*

In order to establish that a piece of land is a public wakf on the ground of user, it is not necessary that there must be evidence of user up to the present day. (*Srivastava, J.*) ABDUL GHAFOOR *v.* RAHMAT ALI. **122 I.C. 326=7 O.W.N. 382=A.I.R. 1930 Oudh 245**

———*Application of usufruct of property for upkeep of mosque does not constitute property as wakf.*

Where there is really no dedication of property as wakf, the mere fact that the income arising out of the property has been appropriated for the upkeep of a mosque is not sufficient proof that it is endowed property. 16 O.C. 76, Foll. 2 Cal. 341 (P.C.) and 7 A.L.J. 1095, Rel. on. (*Stuart, C. J. and Raza, J.*) SHAH WAJIHUDDIN ASHRAF *v.* SHAH MURTAZA ASHRAF. **120 I.C. 828=6 O.W.N. 891=A.I.R. 1930 Oudh 32.**

MAHOMEDAN LAW—Wak—Creation of—User.

———*Dedication can be inferred from long user.*

In order to constitute waqf under the law, the existence of an instrument in writing is not necessary and dedication may be inferred from long user. (*Ashworth and Sen, JJ.*) SHAH ALI HAMMAD *v.* MD. NAZIR ALI.

116 I.C. 18=1929 A.L.J. 517=A.I.R. 1929 All. 329.

———*Intention to create wakf—Manifestation of that intention—Implied dedication by user.*

Waqf may be created by user. But there must be an initial intention of the owner of the property to create waqf in respect thereof such intention being expressed and carried into effect by actual application of the property to the object of the waqf or by its user for the same purpose. It is the intention of the owner which is the guiding factor and the manifestation of that intention may be established by his conduct, by express dedication of the property or by implied dedication by user. The intention must be on the part of the owner of the property and not on the part of others who may have diverted its use to purposes different to those to which it was applied or intended to be applied by the owner. (*Zafar Ali and Jai Lal, JJ.*) KUSHAN KISHORE *v.* DIN MAHOMED.

A.I.R. 1929 Lah. 684.

———*Proof of wakf by user.*

That a waqf may be established by the evidence of user is a well-understood principle of the Mahomedan Law. 40 Cal. 297 (P.C.), Foll. (*Stuart, C. J. and Wazir Hasan, J.*) SAJJAD ALI KHAN *v.* JAGMOHAN DAS.

101 I. C. 563=4 O.W.N. 320=A. I. R. 1927 Oudh 534.

A wakf may be presumed by user.(*Iqbal Ahmad, J.*) IRSHAD HUSAIN *v.* MAKUT MANOHAR. **100 I.C. 626=A.I.R. 1927 All. 377.**

Right to pray on another's land does not exist in absence of express or implied permission by owner. (*Ross, J.*) RAMPRATAB MARWARI *v.* SHEIKH SATIF.

91 I.C. 76=6 P.L.T. 857=27 Cr. L.J. 44=1925 P. H. C. C. 64=A.I.R. 1925 Pat. 435.

———*Public dedication or user necessary for burial ground to be wakf.*

The mere fact that a Muhammadan chooses to bury the body of another Muhammadan in his garden would not make that property wakf property, inalienable for all time. There must be some public user, or public dedication. (*Schwabe, C. J.*) ABDUL RAHIMAN SAHIB CHOWDRY *v.* MURUGAPPA NAICKER.

83 I.C. 536=19 M.L.W 352=34 M.L.T. 312=1924 M. W. N. 359=A.I.R. 1924 Mad. 577.

———*User as, may be evidence of dedication but will not establish dedication.*

There is no authority for the view that it is impossible in the Mahomedan Law for property made use of for religious purposes to be the subject of private ownership. User may be evidence of a dedication the origin of which is unknown but it cannot be a substitute for it. (*Kanhaiya Lal, J.C. and Daniels, A.J.C.*) SADIQ HUSSAIN *v.* NAZIR HASAN KHAN.

66 I.C. 90=9 O. L.J. 111=26 O.C. 82=A.I.R. 1922 Oudh 1.

———*Dedication—Evidence and proof of—Performance of 'urs' if sufficient.*

No particular formality or ceremony is necessary to make a dedication as *Waqf* complete, but there must be clear proof that a declaration of *waqf* has really been made and this should not be hastily presumed from casual remarks let fall in conversation unsupported by acts and conduct.

In the absence of any proof of a direct dedication a wakf may be established by proving that the property has been treated as wakf for a large number of years. The mere fact, however, that [illegible] is held at which offerings are made and the poor are fed is not sufficient by itself to warrant a dedication. (*Leslie Jones and Broadway, JJ.*) PRITAM SINGH *v.* MUSSAMAT DHARM KAUR.

61 I.C. 609 (Lah).

MAHOMEDAN LAW—Wakf—Delivery of possession.

—Wakf—Creation of—Will.

A Sunni Mohammaden can create a valid wakf by a will. 25 All. 236 (P. C.), Foll. (*Findlay, J. C. and Macnair, A. J. C.*) MAHEBUX HUSSAIN *v.* NASURUDDIN.

105 I. C. 75=A. I. R. 1928 Nag. 44.

—Wakf—Cypres.

———*Bequest to charity—Intention to dedicate clear—If instances not charitable, Court can spend for charitable purposes.*

Where the paramount intention of the testator is to dedicate for charity, then although the instances mentioned are not to be regarded as charitable, the Court would apply the income to purposes which it may deem to be charitable. (*Mirza, J.*) AZIMUNNISSA BEGAM *v.* SIRDAR ALI.

102 I. C. 129=29 Bom. L. R. 434=A. I. R. 1927 Bom. 387.

—Wakf—Delivery of possession.

———*Wakf executed without intention to divest himself of ownership cannot be given effect as such.*

If a person executes a deed of wakf but without any intention of his divesting himself of his ownership of the property, the real intention being to utilize the document, should it become necessary as a shield against any claims that any other person might have against him either then or at any future time, the deed cannot be given effect to as a wakf. (*Sir Binod Mitter.*) MAHAMMAD ALI MOHAMMAD KHAN *v.* MT. BISMILLAH BEGAM.

A.I.R. 1930 P.C. 255 (P.C.).

———*Vital factor is transmutation of possession.*

Where the settlor, after declaring the trust, appoints himself a mutawalli, the vital factor, which counts, is the transmutation of possession and where the character of the possession has altered by reason of the fact that possession is no longer held in the exercise of any right of ownership but vicariously for the benefit of the objects of the trust, the wakf prevails, in spite of the fact that there had been no mutation at all or that there was some delay in effecting the mutation. (*Sen and Niamatullah, JJ.*) GHAZANFAR HUSAIN *v.* MT. AHMADI BIBI.

123 I.C. 369=1930 A.L.J. 109=A.I.R. 1930 All. 169.

———*Mere user is insufficient to prove dedication of property—Divestation of property must be indicated.*

User may be evidence of a dedication the origin of which is unknown, but it cannot be substituted for it. What is required is an indication that the wakif has divested himself of his proprietary interest in the subject of wakf. The mere fact, therefore, that a property is set apart for meeting the expenses of a Dargah will not make it wakf property when the right to assume possession and divide it according to the ancestral shares is reserved in a family agreement. 40 Cal. 297 (P.C.); 2 M. I. A. 390 (P. C.) and A. I. R. 1922 Oudh 1, Rel. on. (*Stuart, C. J. and Raza, J.*) SHAH WAJIHUDDIN ASHRAF *v.* SHAH MURTAZA ASHRAF.

120 I.C. 828=6 O.W.N. 891=A. I. R. 1930 Oudh 32.

———According to the exposition of Abu Yusuf the delivery of possession is not essential for the creation of wakf. A. I. R. 1922 Cal. 429, Foll. (*Ross and Chatterji, JJ.*) MUHAMMAD IBRAHIM *v.* BIBI MARIAM.

117 I.C. 638=8 Pat. 484=A. I. R. 1929 Pat. 410.

———*Wakif appointed mutwalli—His retaining possession does not invalidate the wakf.*

MAHOMEDAN LAW—Wakf—Delivery of possession.

Retaining possession of wakf property by wakif, when he is appointed the first mutawalli by the wakf deed does not invalidate the wakf. 15 All. 321 and A. I. R. 1921 All. 165, Rel. on. (*Mukerji and Bennet, JJ.*) MT. SALIMAN *v.* HAKIM MUKHDUN BUX. **116 I.C. 277=A. I. R. 1928 All. 394.**

———*Shia Law—Delivery of possession to mutwalli is necessary—Till such delivery wakif may lay down conditions attaching to wakf.*

Under the Shia law a mere declaration of wakf does not constitute a valid dedication unless delivery of possession is given to the mutwalli. (A. I. R. 1927 P. C. 2, Foll.) and up to the moment of change of possession the wakif may lay down conditions attaching to the wakf. (*Dawson Miller, C. J. and Mullick, J.*) ALI ZAMIN *v.* AKBAR ALI KHAN. **110 I. C. 12=7 Pat. 468=A. I. R. 1928 Pat. 532.**

———*Shia Law—There must be complete divestment of the settlor in intention as well as in fact.*

A wakf to be valid under Shia Law there must be not only a valid dedication, either oral or documentary, but also a complete divestment of interest and a transfer of possession of the dedicated property. Even where the settlor himself is the first mutawalli if it should appear that after the dedication the settlor continued to deal with the properties as if they were his own the inference would be that there was no change in the character of his possession and no intention to divest himself of his proprietary rights. (*Dawson Miller, C. J. and Adami, J.*) ALI ZAMIN *v.* MD. AKBAR ALI KHAN. **116 I.C. 525=7 Pat. 426=9 P.L.T. 699=A.I.R. 1928 Pat. 441.**

———*Settlor appointing himself* mutawalli—*Mutation of names is the usual means of divesting of possession.*

Where the settlor appoints himself as *mutawalli*, the obvious and ordinary means of showing the change in the character of her possession is by mutation of names in the public registry as holding as *mutawalli*. 4 N. W. P. 155 and 24 All. 257, Ref. (*Sir John Wallis.*) MT. ABADI BEGAM *v.* MT. BIBI KANIZ ZAINAB. **99 I.C. 669=6 Pat. 259=54 I.A. 33=25 A.L.J. 51=1927 M.W.N. 12=4 O.W.N. 153=8 P.L.T. 107=38 M.L.T. 33=31 C.W.N. 365=29 Bom. L.R. 763=25 M.L.W. 710=45 C.L.J. 408=A.I.R. 1927 P.C. 2=52 M L.J. 430 (P.C.)**

———*Wakif should divest himself of possession to create a valid wakf.*

The authority of Imam Muhammad should be preferred generally to that of Abu Yusuf and according to the opinion of the former the wakif should divest himself of possession to create a valid wakf. (*Ashworth and Pullan, JJ.*) MAHOMED SHAFI *v.* MD. ABDUL AZIZ. **99 I.C. 1052=43 All. 391=25 A.L.J. 299=A.I.R. 1927 All. 255.**

———*Wakif must divest himself of property in order to validate wakf.*

According to the Hanafi School, it is essential to the validity of a wakf that the wakif should actually divest himself of the property to be made wakf. A.I.R. 1921 All. 103, Foll. (*Maung Ba, J.*) SULEMAN HASSAN DADAN *v.* SHEIK CHAND. **101 I.C. 359=5 Bur. L J. 226=A.I.R. 1927 Rang. 125.**

———*Divesting of ownership is essential.*

A wakf fails if the author does not divest himself of the ownership of the property. Though the property need not be handed over to a stranger appointed as *mutwalli*, there must be some act on the part of the author showing that he divested himself of the possession of the property as owner thereof and assumed possession of it as *mutwalli*. (*Dalal and Cuming, A. J. Cs.*) ABDUL MABUD KHAN *v.* NAWAZISH ALI KHAN. **84 I.C. 152=A.I.R. 1925 Oudh 301.**

MAHOMEDAN LAW—Wakf—Illusory.

———*Where settlor is the* Mutwalli *no delivery of possession is necessary.*

Even if transmutation of possession is necessary, no formal delivery is essential where the settlor is himself the first *mutwali*. (*Mookerjee and Buckland, JJ.*) BIBI JINJIRA KHATUN *v.* MOHAMMAD FAKIRULLAH MIA. **67 I.C. 77=49 Cal. 477=26 C.W.N. 749=34 C.L.J. 444=A.I.R. 1922 Cal. 429.**

———*Hanafi Law—Creation of wakf—Intention declared—Wakif appointing himself* Mutawalli—*No need to transfer possession.*

Where it was proved that the waqif did intend to create a valid Waqf, declared the property to be Waqf property and appointed himself as a *mutawalli* and so where there was no need of formal transfer of possession,

Held, that there was a valid Waqf under the Hanafi Law and that the subsequent conduct of a *mutawalli* would not invalidate it. (*Mears, C. J. and Knox, JJ.*) ABDUL JALIL KHAN *v.* OBEDULLAH KHAN. **62 I.C. 725=43 All. 416=19 A.L.J. 227=A.I.R. 1921 All, 165.**

———*Hanafi Law—Possession must be transferred.*

According to the law of Sunni Muhammadans, it is essential to the validity of a *waqf* that the *waqif* should actually divest himself of possession of the *waqf* property. 15 All. 321, Foll. (*Rafique and Stuart, JJ*). MUHAMMAD YUNIS *v.* MUHAMMAD ISHAQ KHAN. **62 I.C. 836=43 All. 487=19 A.L.J. 380=A.I.R. 1921 All. 103.**

———*Divesting of possession is essential—Possession, delivery of, if necessary.*

The doctrine of Mushaa is not applicable to freehold properties in a commercial town. A *waqf* can validly be made of an undivided share in property even when the property is capable of division. A Sunni Mahommedan, however, making a *waqf* must actually divest himself of possession of the *waqf* property. (*Rigg, J.*) KHATIZA BIBI *v.* HAJEE AHMED. **61 I.C. 689=13 Bur. L.T. 127.**

—Wakf—Effect of.

The word " wakf " literally signifies " detention "; technically it means a dedication in perpetuity of some specific property for a pious purpose or a succession of pious purposes. When a wakf is made of a property the proprietary right of the grantor is divested, therefrom and it remains thenceforth in the implied ownership of the Almighty. The usufruct alone is applied for the benefit of human beings and the subject of the dedication becomes inalienable and non-heritable in perpetuity. A. I. R. 1922 P. C. 123, Rel. on. (*Stuart, C. J. and Raza, J.*) SHAH WAJIHUDDIN ASHRAF *v.* SHAH MURTAZA ASHRAF. **120 I.C. 828=6 O.W.N. 891=A.I.R. 1930 Oudh 32.**

—Wakf—Illusory.

———*Wakf made prior to* 1913—*Illusory bequest to charity—Real object to benefit settlor's family—Wakf is not valid nor is made valid by Mussalman Wakf Validating Act* (*VI of* 1913).

In order to perpetuate the names of his ancestors, and to keep the properties intact for ever, a Mahomedan made wakf in 1869 of all his properties for the benefit of his children, etc., how low soever; and in their absence, of the poor kinsmen and relatives, mendicants, people destitute of all means, widows and

MAHOMEDAN LAW—Wakf—Law applicable

orphans for all time. Out of the income of Rs. 10,000 the settlor had set apart Rs. 456 per year for charities. Some of the descendants sued for partition of the properties in 1922.

Held : that the provisions for the benefit of the settlor's family were invalid as constituting wakf under the Mahomedan law and they could not be validated by the Mussalman Wakf Validating Act, 1913, which is not retrospective, and that the gift to charity was so small in comparison with the income of the property that the gift for charities might very well be considered to be quite illusory. 17 Cal. 498 (P. C.); 17 Bom. 1 (P. C.); 22 Cal. 619 (P. C.); 23 All. 233 (P. C.); 27 All. 320 (P. C.) ; A. I. R. 1922 P. C. 107, Rel. on. (*B. B. Ghosh and Roy, JJ.*) MT. RUKEYA BANU *v.* MT. NAZIRA BANU. **105 I.C. 647=32 C.W.N. 248= 55 Cal. 448=A.I.R. 1928 Cal. 130.**

—Wakf—Law applicable.

——*Suit for establishment of charity—Dawoodi Borahs—Suit must be decided according to Shiah Law.*

A suit by the Advocate-General *ex officio* to establish certain charities in the community of the Dawoodi Borahs ought to be decided in accordance with Shiah Muhammadan Law in so far as the same is applicable to Dawoodi Borah community, and is not expressly or impliedly negatived by the general law of the land. If any customary variations are proved to exist, they should be given effect to. (*Marten, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* YUSAF ALI EBRAHIM.

84 I.C. 759=24 Bom. L.R. 1060= A.I.R. 1921 Bom. 338.

—Wakf—Lease.

——*Lease of wakf property proved to be permanent and at fixed rate—Presumption of lawful origin can be made—Nature of presumption explained.*

Where a lessee of a wakf property *prima facie* proves a heritable right in the tenure at a fixed rate an assumption that the grant was originally lawful can be made.

The presumption of an origin in some lawful title which the Court has so often readily made in order to support possessory rights, long and quietly enjoyed, where no actual proof of title is forthcoming is one which is not a mere branch of the law of evidence. It is resorted to because of the failure of actual evidence. The matter is one of presumption based upon the policy of law but even considered as an inference from proved facts the grant presumed is the thing which may well be regarded as likely to have happened. At the same time it is not a presumption to be capriciously made nor is it one which a certain class of possessor is entitled to, *de jure*. In a case such as this where it is necessary to indicate what particular kind of lawful title is being presumed the Court must be satisfied that such a title was in its nature practicable and reasonably capable of being presumed without doing violence to the probabilities of the case. It is the completion of a right to which circumstances clearly point where time has obliterated any record of the original commencement. The longer the period within which and the remoter the time when first a grant might be reasonably supposed to have occurred the less force there is in an objection that the grant could not have been lawful. A.I.R. 1926 Cal. 322, Affirmed; A.I.R. 1922 P.C. 163, Rel. on ; 19 Mad. 485 and A.I.R. 1917 P.C. 6, Ref. (*Viscount Summer.*) MUHAMMAD MAZAFFARALMUSAVI *v.* BIBI JABEDA KHATUN. **123 I.C. 732=32 Bom. L.R. 633= 34 C.W.N. 462=1930 A.I.J. 377=51 C.L.J. 345=**

MAHOMEDAN LAW—Wakf—Mosque.

32 M.L.W. 28=1930 M.W.N. 559= A.I.R. 1930 P.C. 103=58 M.L.J. 641 (P.C.).

—Wakf—Management.

The Imam of a mosque is a servitor of the mosque and as such has no right to be a member of the Managing Committee of the mosque whose functions are those of the master. (*Zafar Ali and Jai Lal, JJ.*) MUHAMMAD SHAFI *v.* MD. ABDUL RAHIM.

121 I.C. 74=31 P.L.R. 220=A.I.R. 1930 Lah. 476.

——*Right and powers of ahlimohallas.*

The rights and powers of ahlimohallas are well recognized by Mahomedan Law and their right to have a voice in the management of the affairs of the mosque is superior even to that of such benefactors of the wakf as do not reside in the locality and are not among the regular worshippers at that mosque. (*Zafar Ali and Jai Lal, JJ.*) MUHAMMAD SHAFI *v.* MD. ABDUR RAHIM. **121 I. C. 74= 31 P.L.R. 220=A.I.R. 1930 Lah. 476.**

Per *Sen, J.*—The mere fact that no member of the public is appointed a trustee will not invalidate a trust for charitable purposes. (*Sen and Niamatullah, JJ.*) IRFAN ALI *v.* BHAGWANT KISHORE. **112 I.C. 623= A. I. R. 1929 All. 180.**

——*Hereditary right of management does not exist with regard to trust property unless provided for.*

There is no such thing as hereditary right of management with regard to trust property. No doubt it is quite open to the author of the trust who creates a wakf to provide for the devolution of the management in his line. But when he does not make such a provision, Court cannot apply the ordinary notion derived from the Hindu Law which favours hereditary rights even in the case of a wakf. 43 Cal. 467 and 13 Bom. 555, Rel. on. (*Devadoss, J.*) MD. S. CHAMNAD *v.* JAINABI. **96 I.C. 105=23 M.L.W. 740= A.I.R. 1926 Mad. 861.**

——*Wakif can be trustee if so provided in trust deed.*

Where the trustee had reserved the trusteeship for himself in the deed of wakf,

Held : that the wakif was entitled to manage the wakf property as its mutwalli. (*Broadway and Abdul Raoof, JJ.*) TAFAZZAL BEG *v.* MAJID ULLAH.

79 I.C. 120=5 Lah. 59=A.I.R. 1924 Lah. 432.

—Wakf—Mosque.

——*Suit against mosque represented by mutawalli —Decree in—Execution.*

Where in a suit against a mosque the mosque is represented by mutawallis and the litigation terminated by the decree, to enable the decree-holder to attach the mosque property it is not necessary that there should be direction in the decree that the mosque property would be liable. (*Jwala Prasad, J.*) BHADE MANDER *v.* KHODABAX. **A.I.R. 1929 Pat. 746.**

——Every Muhammadan is entitled as such to attend any mosque for worship. (*Odgers and Madhavan Nair, JJ.*) MAHOMED KHAN *v.* KADIR BATCHA SAHEB. **92 I.C. 950=23 M.L.W. 240=A.I.R. 1926 Mad. 466.**

——*Private or public—Existence of Mihrab and Mimbar—If affords conclusive proof.*

The question whether a particular building is a public mosque or not is a question of fact, and while the existence of a *mihrab* and *mimbar* may be evidence to be considered along with the other facts in the case, in deciding that question of fact it is not possible to lay down that as a matter of law the judge is bound to accept the existence of such structures as practically conclusive proof of the fact that the building in question was a public mosque. (*Shah and*

MAHOMEDAN LAW—Wakf—Mosque.

Crump, JJ.) SHEIKH HASANSAB *v.* MOHIDINSAB.
70 I. C. 850 = A.I.R. 1923 Bom. 42.

———*Ahl Hadis—Right to worship.*

Ahl Hadis have a right to worship at the same mosque as other Muhammadans. 15 P. R. 1902 (Cr.); 13 All. 419 and 18 Cal. 448 (P. C.), Foll. *(Daniels, A.J.C.)* ABDUR RAHMAN *v.* EMPEROR.
62 I.C. 830 = 8 O.L.J. 282 = 22 Cr. L.J. 590.

—Wakf—Mutwali—Appointment.

———*Founder of trust can nominate successor by name or by class.*

Under the Mahomedan Law, mutawalli who is not the founder of the trust, has no power whilst in health to appoint a successor or to formulate any scheme for succession to the office of the mutawalli, but this restriction does not apply to the founder of the wakf, who in reason and equity ought to have a free hand in the matter of nominating and appointing a mutawalli for the administration of the trust *in præsenti* and in laying down a detailed scheme as regards the succession to the office of the mutawalli. He is therefore competent to nominate the successors by name or to indicate the class together with their qualifications from whom the mutawalli may be appointed or to invest the mutawalli with power to nominate his or her successor after death or abandonment of office. And further the fact that the settlor appointed his wife as his successor to the tauliyat or invested her with power to appoint a successor from the male issue of her sister or from among any other proper person belonging to the founder's family who were particular about the roza and namaz and fulfilled the further condition of being najibultarfain is not a circumstance which in any way militates against the provision of the Mahomedan Law. *(Sen and Niamatullah, JJ.)* GHAZANFAR HUSAIN *v.* MT. AHMADI BIBI.
123 I.C. 369 = 1930 A.L.J. 109 = A.I.R. 1930 All. 169.

———*Office hereditary—If next heir is a minor, deputy may be appointed.*

Where the office of a trustee is hereditary and the person to be appointed is always the next heir, although there is no such absolute right to be so appointed a trustee under the Mahomedan Law, the Court should not pass over the next heir unless there is some strong reason for doing so; and if the next heir happens to be a minor, the minor may be recognized as trustee and a suitable deputy may be appointed. 19 Cal. 203; A.I.R. 1921 Mad. 248; A.I.R. 1923 P.C. 11, Rel. on. *(Ramesam and Jackson, JJ.)* KALANDAR BATCHA SAHIB *v.* JAILANI SAHIB.
A.I.R. 1930 Mad. 554.

———Under Mahomedan Law, Court has power of appointing a trustee directly without his having recourse to S. 92. A.I.R. 1924 Cal. 441 and A.I.R. 1916 P. C. 132, Rel. on. *(Wallace and Madhavan Nair, JJ.)* AMBALAVANA THAMBIRAN *v.* VAGEESAM PILLAI. **122 I.C. 455 = 1929 M.W.N. 745 = A.I.R. 1930 Mad. 226.**

———*Powers of the dedicator.*

It is usual for the dedicator of the wakf property to lay down rules of succession of the mutwalli. But if no such rules are laid down, the power of appointment is vested in the dedicator during his life. 8 M. H. C. R. 63, Foll. *(Dawson Miller, C. J. and Mullick, J.)* ALI ZAMIN *v.* AKBAR ALI KHAN. **110 I. C. 12 = 7 Pat. 468 = A. I. R. 1928 Pat. 532.**

———*Rights of the mutawali for the time being.*

In the absence of rules laid down by the founder of the mosque, the mutawali for the time being may validly appoint a successor to himself. *(Odgers and Madhavan Nair, JJ.)* MAHOMED KHAN *v.* KADIR BATCHA SAHEB. **92 I. C. 950 = 23 M. L. W. 240 = A. I. R. 1926 Mad. 466.**

MAHOMEDAN LAW—Wakf—Mutwali—Dismissal.

———De facto *Mutwalli.*

When there was no proper nomination of a Mutwalli, a *de facto* mutwalli was allowed to take charge of the trust subject to any suit, by the person interested for his removal. *(Walsh and Kanhaiya Lal, JJ.)* MUIZ-UD-DIN *v.* MOHAMMAD IKHLAG. **74 I. C. 756 = 21 A. L. J. 516 = 4 L. R. A. Civ. 503 = A. I. R. 1924 All. 59.**

———*District Judge—Power to appoint Mutwalli.*

Where a deed provided that a vacancy occurring in the office of *Mutwalli* should be filled by a pious Muhammadan appointed by a competent Court, *held* that the District Judge has the powers of a *Kazi* under the Muhammadan Law in such matters and can make the appointment in accordance with the terms of the deed of endowment on application being made to him and that a suit framed under S. 92, C. P. Code, is not necessary. (23 C. W. N. 138, Dist.) *(Sanderson, C. J. and Richardson, J.)* MOHIUDDIN CHOUDHURY *v.* AMINUDDIN CHOWDHURY.
72 I. C. 930 = A. I. R. 1924 Cal. 441.

———*Persons entitled to.*

By the rules of Mahomedan Law if no rules of succession to the *towliat* are made by the creator of the endowment, the right of appointing a Mutwalli vests, first in the founder, after his death in the executor, and, in case of failure of the above two, in the Quazi or the officer of the Civil Court. 32 All. 503, Applied. *(Gokul Prasad, J.)* RAZA ALI *v.* MOAZZAM ALI. **70 I.C. 836 = A.I.R. 1923 All. 12.**

———*Uniformity of succession—Presumption of—Lawful origin.*

Quaere:—Whether the uniformity which characterises the successive appointments for nearly a century may not improbably indicate that the practice had a lawful origin in the direction given for appointments of successor to the office of mutwali by the original founder, though they can no longer be traced with certainty owing to the lapse of time. *(Mookerjee, A.C.J. and Fletcher, J.)* KASIM HUSSAIN *v.* HAZRA BEGAM. **60 I.C. 165 = 32 C.L.J. 151.**

———*Mutwalli in health—Power to nominate successor.*

Though a mutwalli not himself the founder of the wakf has power in his death illness to appoint a successor; he has no such power whilst in health and still less to draw up a scheme for succession to the office of mutwalli. *(Adami and Bucknill, JJ.)* AZIZ-UN-NISSA *v.* GHOWSAN KASAB. **63 I.C. 136 (Pat.).**

—Waqf—Mutwallis—Decree against.

———*Suit and decree against one—Not binding on waqf or other mutwalli.*

A suit for rent and a decree therein against one of two mutwallis of a waqf is not binding on the other Mutwalli or on the waqf in the absence of proof that the person sued represented the other mutwalli or the waqf in the landlord's *sherista*. *(Suhrawardy and Cuming, JJ.)* ABDUL GANI *v.* NABENDRA KISHORE ROY. **65 I.C. 592 (Cal).**

—Waqf—Mutwali—Dismissal.

———*Manager of wakf property—Not a Mutwalli.*

Where the Managing Committee of a wakf appoints a person for the management of the property and reserves power of dismissal at its option, such a person is not really a mutwali under the provisions of Mahomedan law and he is liable to be dismissed at any time at the option of the Committee. 41 Cal. 19, Ref. *(B.B. Ghose and Bose, JJ.)* AJAZ HOSSAIN *v.*

MAHOMEDAN LAW—Wakf—Mutwali—Dismissal.
ALTAF HOSSAIN. 114 I.C. 413= A.I.R. 1923 Cal. 651.
———*Agreement to appoint Committee of mutawallis with power to remove one among them by majority—Removed trustee cannot refuse to produce previous accounts.*

Clause 14 of the agreement which dealt with the dismissal of a mutawalli was in the following terms :—

" Should a mutwalli in the opinion of six mutwallis at least be found dishonest or negligent or should the existence of a mutwalli be not useful for the management of the mosque or should he make unnecessary interference in the management of the mosque he shall lose his rights, and another man of his caste shall be appointed in his place in accordance with the above rules." Two-thirds majority of the mutwallis passed a resolution removing the plaintiff who was one of the mutawallis from the committee of the management of the institution.

Held, that plaintiff was legally removed and that he was not justified in refusing to producing previous accounts of the institution as demanded by the new body of mutawallis. (*Shadi Lal, C.J. and Fforde, J.*) KHUDA BAKSH *v.* NUR MUHAMMAD. 85 I.C. 807= A.I.R. 1923 Lah. 379.

—Wakf—Mutwali—Female.
———*Woman can become Mutwalli.*

There is no objection under Mahomedan Law to a woman doing the temporal duties of mutawalli of a mosque. (*Devadoss and Wallace, JJ.*) MT. MOIDEEN BIBI AMMAL *v.* RATHNAVELU MUDALI. 98 I.C. 812=1926 M.W.N. 943= A.I.R. 1927 Mad. 69=51 M.L.J. 598.
———*Competency of.*

A woman is not disqualified from holding the office of Mutwalli, provided she can perform religious duties attached to the office, either herself or by deputy. The burden of proving that she is incompetent lies on the person desiring to exclude her. (*Mookerjee, C. J. and Fletcher, J.*) KASIM HASSAN *v.* HAZRA BEGUM. 60 I.C. 165=32 C.L.J. 151.

—Wakf—Mutwali—Jurisdiction of Court.
———*Minor Mutawalli—Deputy appointed by Court—Suit for accounts by minor on attaining age—Not maintainable.*

Although the technicalities of law and procedure under the English Law relating to trusts and trustees, cannot be said to apply in their entirety to this country, there is a good deal in common between the appointment of an acting mutwalli during the minority of one who is entitled to the towliat under the foundation deed but happens to be a minor at the time and the appointment under the English statute of a new trustee in the place of an infant trustee appointed by a will. The Court has general powers of supervision over a waqf. In the exercise of such general powers of supervision the Court fixes the remuneration of a mutwalli, removes an incompetent or dishonest mutwalli despite anything to the contrary laid down by the wakif, passes orders authorizing dealings with wakf property if beneficial for the wakf. In the exercise of such general powers of superintendence and for the purpose of removing the mutwalli or taking action against him, the Court may on a proper case being made out call for his accounts, but there is no authority under which the Court has the power to order a mutwalli to render accounts on the application of the minor on his attaining majority whereby he seeks to use the machinery of the Court for that end. The property in the case of a wakf does not vest in the mutwalli ; the ownership is extinguished altogether or is vested in the Almighty and the mutwalli is, as the name implies, a mere manager on His behalf. (*Mukerji and Graham, JJ.*) SAHEBZADA FOREDUN *v.* JEHANARA BEGAM. 101 I.C. 104= 31 C.W.N. 454=A.I.R. 1927 Cal. 382.

MAHOMEDAN LAW—Wakf—Mutwali—Power to alter.

—Wakf—Mutwali—Limitation.
———*Mutwallishipnot hereditary—Person holding office if not ousted within six years gets indefeasible title.*

The office of Mutwalliship not being a hereditary one, a suit to oust a person from his office as Mutwalli is regulated by Art. 120 of the Act, and if no suit has been brought to oust him by reason of his having held the office for over six years he would acquire an indefeasible right to hold the office of Mutwalli and would acquire a complete title for the purposes of litigation or anything connected with the endowment. 19 Cal. 776 ; 26 Mad. 113 and 37 Cal. 263, Rel. on. (*Suhrawardy and M. N. Mukerji, JJ.*) DEBENDRA NATH *v.* SHEIKH SEFATULLA. 99 I.C. 205= 44 C.L.J. 339=31 C.W.N. 184= A.I.R. 1927 Cal. 130.

—Wakf—Mutwali—Malfeasance.

Malfeasance or misfeasance on the part of the mutwallis cannot invalidate a waqf which at its creation was a valid one. (*Walmsley and Mukerji, JJ.*) KARIMANNESA BIBI *v.* HAMEDULLA. 90 I.C. 218= 30 C.W.N. 129=A.I.R. 1926 Cal. 401.

—Wakf—Mutwali—Minor.
———*Waqf cannot fail because the mutawalli is minor.*

A waqf will not fail because of the minority of the mutawalli. If the waqf appoints a minor as mutawalli and no adult is associated with him, the Qazi shall appoint some person to do the work until the minor attains majority. If there is an adult associated with the minor the Qazi may appoint some person to represent the minor and act jointly with the co-mutwalli, or may empower the adult mutwalli to act for the minor. 19 Cal. 203 ; 18 O. C. 726 ; 39 All. 288 and 40 Mad. 941, Dist. (*Mukerji and Weir, JJ.*) MT. NABI-UN-NISSA *v.* LIAGAT ALI. 113 I.C. 723= 50 All. 830=26 A.L.J. 748=A.I.R. 1928 All. 508.

Where the succession is not by inheritance but by appointment or selection a minor cannot be appointed as muttawalli. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) KANIZ ZOHRA *v.* SYED MUSTAPHA HUSSAIN. 77 I.C. 209=2 Pat. 819=1923 P.H.C.C. 241= 4 P.L.T. 613=A.I.R. 1923 Pat. 576.
———*Mutawalli need not be a major—Being* 15 *years of age is enough.*

It is not majority that is required in a mutawalli, but puberty and understanding, and a person may fairly be presumed to have attained both these on the completion of his fifteenth year, both under S. 114 of the Evidence Act and also under the Muhammadan Law. 40 Mad, 941, Dist. ; 19 Cal. 203, Foll. (*Hallifax, A. J. C.*) MT. HANSKUARBAI *v.* IMAM ALI SHAH. 59 I.C. 717=17 N.L.R. 126=A.I.R. 1921 Nag. 53.

—Wakf—Mutwali—Power to alter.

On the creation of a valid *Wakf* all rights of the *Wakif* in the endowment are divested except such of them as he has expressly reserved to himself in conformity with the law ; in the absence of an express power being reserved on that behalf at the time of the creation of the *Wakf*, a Wakif has no power to alter the line of *mutwallishiip* or to affect any *Wakfs* validly created by him, which are, therefore, irrevocable. (*Percival, J.C. and Rupchand Bilaram, A.J.C.,*) ABDUL NABI KARIMDINO *v.* MAZHARALI NUR MAHOMED. 125 I.C. 33.

MAHOMEDAN LAW—Wakf—Mutwali—Removal of.

—Wakf—Mutwali—Removal of.

———*Mutwalli also beneficiary.*

The validity of a *Wakf* being dependent upon the ultimate benefit going to a public object, malversation of property resulting in prejudice to the ultimate public, *Wakf* by the intermediate beneficiary *qua mutwalli* may be prevented by their removal. His liability to removal is not affected by the fact of his being a beneficiary as well. (*Percival, J. C. and Rupchand Bilaram, A. J. C.*) ABDUL NABI KARIMDINO *v.* MAZHARALI NUR MAHOMED. **125 I.C. 33.**

—Wakf—Mutwalli—Rights of.

———*Power to grant Permanent lease.*

A *mutwalli* cannot grant a valid permanent lease, unless the lessee can show that the lease came within the scope and spirit of the endowment. Per *Richardson, J.*—A permanent lease granted by a *mutwalli* apart from express authority is void. (*Sanderson, C.J. and Richardson, J.*) AKSHOY KUMAR SHAH *v.* BROJENDRA CHANDRA DUTTA. **62 I.C. 674 (Cal).**

———*Mutawalli* de facto *has right to collect money of the trust* (*rent of shops*).

A *de facto* Mutawalli of a Mahomedan religious trust is entitled to act on behalf of the trust and sue for recovery of the rent of the shops belonging to the trust without being put to proof of his antecedents and the origin of his authority to manage the trust. When it is desired by the tenant to displace a *de facto* manager, his only remedy lies in taking action under S. 92, C. P. Code A.I.R. 924 All. 59; A,I.R. 1926 Mad. 1066: A.I.R. 1927 Mad. 69, Ref. (*Dalal, J.*) ABDUL RAHIM KHAN *v.* RAMZAN. **118 I.C. 382= A.I.R. 1929 All. 518.**

The mutwalli has no legal estate in the property: A.I.R. 1922 P. C. 123; A.I.R. 1923 P.C. 44. Foll. (*B.B. Ghose and Roy, JJ.*) RUKEYA BANU *v.* NAZIRA BANU. **105 I.C. 647=55 Cal. 448= 32 C.W.N. 248=A.I.R. 1928 Cal. 130.**

———*Person professing to act as mutwalli right to sue in respect of the wakf properties.*

The mere fact that a man professes to act as Mutwalli does not entitle him to institute a suit for recovering possession of wakf properties from one who may have wrongfully acquired possession of it; 19 Cal. 203 and 24 Bom. 170, Dist. (*Suhrawardy and M. N. Mukerji, JJ.*) DEBENDRA NATH *v.* SHEIKH SEFATULLA. **99 I.C. 205=44 C.L.J. 339= 31 C.W.N. 184=A.I.R. 1927 Cal. 130.**

———*Right to hold wakf properties.*

To hold the properties of the wakf is a right appurtenant to the office as Mutwalli: 27 I. A. 69 Foll. (*Suhrawardy and M. N. Mukerji, JJ.*) DEBENDRA NATH *v.* SHEIKH SEFATULLAH. **99 I.C. 205=44 C.L.J. 339= 31 C.W.N. 184=A.I.R. 1927 Cal. 130.**

———De facto *trustee—rights of.*

A person not validly entitled to act as mutwalli may, by taking charge of it and purporting to manage the property, thereby become a trustee *de son tort* and answerable as such. The concept of a *de facto* trustee or trustee *de son tort* is not foreign to Mahomedan Law.

The *de facto* trustee of a mosque can collect the rents and reimburse himself for the expenses of the collection out of the rent collected: 37 All. 86 and 38 Mad. 260, Rel. on. (*Devadoss and Wallace, JJ.*) MT. MOIDEEN BIBI AMMAH *v.* RATHNAVELU MUDALI. **98 I.C. 812=1926 M.W.N. 943= A.I.R. 1927 Mad. 69=51 M.L.J. 598.**

———*Right to appoint servants of the mosque.*

The *mutwalli* of the mosque, unless he is displaced from his position as such, has power to manage the trust property. As the *mutwalli*, he has the right to appoint a servant of the mosque and if the congregation is not satisfied with the appointment made by him the only course open to them would be to go to the proper Court to have the *mutwalli* removed or to make him adopt the proper and legal mode of managing the *wakf* property. (*Walmsley and Suhrawardy, JJ.*) HAJI MD. ISMAIL *v.* MUNSHI BARKAT ALI. **71 I.C. 506=26 C.W.N. 904= 24 Cr. L.J. 154=A.I.R. 1922 Cal. 483.**

MAHOMEDAN LAW—Wakf—Object of.

—Wakf—Mutwalli—Status of.

The Mutwallis are more closely allied to Receivers and Managers appointed over property than to trustees in whom the property is absolutely vested. (*Lord Buckmaster.*) MUHAMMAD RUSTAN ALI KHAN *v.* MUSHTAQ HUSSAIN. **57 I.C, 329=42 All. 609= 47 I.A. 224=18 A.L.J. 1089=32 C.L.J. 471= 1 P.W.R. 1921=28 M.L.T. 220=12 M.L.W, 539= 1920 M.W.N. 565=25 C.W.N. 122= A.I.R. 1921 P.C. 105=39 M.L.J. 263 (P.C.).**

—Wakf—Mutwalli—Succession.

The office of mutwalli is not hereditary and succession thereto is governed by certain well established rules and principles. (*Broadway and Tapp, JJ.*) GAHNE SHAH *v.* MOULA SHAH. **A.I.R. 1930 Lah. 728.**

—Wakf—Object of.

Wakf for celebration of ceremonies connected with the death of the settlor.

A wakf for celebration of ceremonies in connexion with the death of the settlor is not void according to the Mahomedan Law. Nor can such a "wakf" be declared void on the ground of public policy as under the definition of "wakf" in Mussalman Wakf Validating Act, religious and pious objects are recognized as valid: 31 All. 136; A.I.R. 1921 Pat. 125; 33 All, 400; 9 Cal. 176; 19 All. 211; A.I.R. 1916 P.C. 86; 36 Bom. 111; and 5 Bom. L. R. 1010, Foll. and 18 Mad. 201 Not applicable. (*Mirza, J.*) ABULSAKUR *v.* ABUBAKKAR, **32 Bom.L.R. 215=A.I.R. 1930 Bom. 191.**

———*Permanent dedication explained.*

Per *Sen, J.*—The words "permanent dedication," imply that the subject and the object should be unfailing. (*Sen and Niamatullah, JJ.*) IRFAN ALI *v.* BHAGWANT KISHORE, **112 I.C. 623= A.I.R. 1929 All. 180.**

———*Dedication in favour of one's descendants.*

The mere use of the word "wakf" or the making of a wakf in favour of one's descendants does not necessarily predicate an ultimate dedication in favour of the poor or some other meritorious object. (*Case-law discussed.*) (*Sen and Niamatullah, JJ.*) IRFAN ALI *v.* BHAGWANT KISHORE. **112 I.C. 623= A.I.R. 1929 All. 180.**

———(Per *Sen, J.*)—*Intention to benefit exclusively the family—Public having no right to control—Ultimate benefit to poor cannot be implied* (*Niamatullah, J., contra,*)

Where the wakf indicates the objects of the endowment and limits them to the members of his family and states in explicit language that the wakf is intended exclusively for the benefit of his family and the members of the public have no right of administration or control, an ultimate benefit to the poor cannot be implied from such a transaction. (*Case law discussed.*) (*Sen and Niamatullah, JJ.*) IRFAN ALI *v.* BHAGWANT KISHORE. **112 I.C. 623=A.I.R. 1929 All. 180.**

———*Bequest to charity—What are charitable objects depends on what people in practice deem to be charitable—Anniversary of Fateha and Urs are charitable purposes.*

MAHOMEDAN LAW—Wakf—Object of.

In order to determine whether certain objects are charitable, Courts of law are not primarily concerned with what may be the true tenets and practice of a religion as propounded by its founder, but they have to take into consideration the tenets and practice of the religion as understood and practised by the people professing such religion in the country, where the Courts are administering the law. The anniversary Fateha or Urs ceremonies at the tombs of ordinary individuals and specially of saints form an integral part of the religious and charitable life of the general body of Mahomedans. (*Mirza, J.*) AZIMUNNISSA BEGUM *v.* SIRDAR ALI. **102 I.C. 129=29 Bom. L.R. 434=A.I.R. 1927 Bom. 387.**

———*Property given to Sajjadanashin of a khanqah for its upkeep is wakf property.*

The property given to the Sajjadanashin of a khanqah for the upkeep of the buildings and the school connected therewith is the wakf property and cannot, therefore, be attached in execution of a decree against Sajjadanashin, nor can the rents and profits of the said property be held to be liable to attachment: A.I.R. 1921 P.C. 123 (P.C.), Rel. on.

If the Sajjadanashin's name is used in the endowment, it cannot by any means be said that the property was given to him and not to the institution. (*Wazir Hasan and Gokaran Nath Misra, JJ.*) SHAH MOHD. NAIM ATA *v.* MOHD. SHAMSHUDDIN. **100 I.C. 241=2 Luck. 109=4 O.W.N. 116=A.I.R. 1927 Oudh. 113.**

———*Wakf in favour of Takia is valid.*

The word 'fakir' does not mean 'beggar' but it means a'holy person who has relinquished the world and devotes his time to imparting religious instructions to his disciples and others. The place of abode of a fakir is called a *takia* before he attains sufficient public importance, and when a fakir attains sufficient public importance and a large number of disciples begin to get round him and lodgment is provided for such disciples, then the place is called a *khankah* : and then if the fakir on his demise is buried in the *khankah* it becomes a *dargah*.

The *takia* itself is an institution recognised by law and a grant of endowment to the same will be as valid a wakf as to a *khankah*, a *dargah* or a mosque. (*Abdul Raoof and Jai Lal, JJ.*) HUSSAIN SHAH *v.* GUL MUHAMMAD. **88 I.C. 816=6 Lah. 140=A.I.R. 1925 Lah. 420.**

———*Gift by way of Sadakah.*

A gift by way of sadakah indicates that the special motive of the gift is to acquire religious merit or nearness to God, but it does not necessarily follow that because such a gift is made, it is a charity in the eye of the law. (*Marten, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* YUSUF ALI EBRAHIM. **84 I. C. 759=24 Bom. L. R. 1060=A. I. R. 1921 Bom. 338.**

———*Gifts for the up keep of Tomb.*

Tomb of a saint itself may be a charitable object and gifts for its perpetual up-keep may be valid charitable gifts. (*Marten, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* YUSUF ALI EBRAHIM. **84 I.C. 759=24 Bom. L. R. 1060=A. I. R. 1921 Bom. 338.**

Feasts and ceremonies by whole community in honour of a saint are charitable objects. (*Marten, J.*) ADVOCATE GENERAL OF BOMBAY *v.* YUSUF ALI EBRAHIM. **84 I.C. 759=24 Bom.L. R. 1060=A.I.R. 1921 Bom. 338.**

———*Celebration of Moharram and its connected ceremonies.*

Where the object of the endowment was to make a permanent provision for the celebration of the Moharram and the ceremonies in connection thereto,

MAHOMEDAN LAW—Wakf—Proof of.

Held, that the object of the Wakf was not too vague to be carried into effect. (*Das and Ross, JJ.*) ISMAIL ALI KHAN *v.* HAMIDI BEGUM. **62 I.C. 455=6 P. L. J. 218=2 P. L. T. 658=A. I. R. 1921 Pat. 125.**

—Wakf—Private.

Mahomedan law recognizes private wakf: A. I. R. 1916 P.C. 132, Foll. (*Banerji and Weir, JJ.*) MUHAMMAD SHAFIQ AHMAD *v.* MUHAMMAD MUJTABA. **111 I.C. 93=51 All. 30=26 A. L. J. 1016=A. I. R. 1928 All. 660.**

———*Wakf deed—Vague provision for charity—Wakf is a private trust.*

A wakf deed provided that the office of Mutwalli should be hereditary in wakf's family, that the mutwalli should spend at least 1/32 part of the income of the wakf property at his discretion on good deeds and charity. It was also provided that no outsider was to benefit himself in the lifetime of the wakf or his son or son's sons.

Held : that the wakf was a private trust even though the ultimate trust was for charitable purpose, and that since there was no dedication of any defined portion of the property to charity and the objects on which the small sum was to be spent were stated vaguely and discretion to mutwalli consequently was wide, there was no effectual dedication to charity so as to be a public trust under S. 92; C. P. Code; *Williams* v. *Kershaw*, 4 Cl. & F. 111; A. I. R. 1917 P. C. 133; 17 Cal. 498; 23 All. 233 (P. C.); and 27 All. 320 (P.C.); Foll. (*Banerji and Weir, JJ.*) MUHAMMAD SHAFIQ AHMAD *v.* MUHAMMAD MUJTABA. **111 I. C. 93=51 All. 30=26 A. L. J. 1016=A. I. R. 1928 All. 660.**

———*Private and public mosque.*

The argument that a dedication in favour of a mosque is a private wakf and not public, cannot stand where it is not alleged that the mosque was a private mosque and that the public had no right to congregate therein without special permission. 43 C. 1085 (P. C.) Ref. (*Broadway and Abdul Raoof, JJ.*) TAFAZZAL BEG *v.* MAJID ULLAH. **79 I.C. 120=5 Lah. 59=A.I.R. 1924 Lah. 432.**

—Wakf—Proof of.

———Unequivocal declaration of intention to dedicate is enough to constitute *wakf* according to Abu Yusuf whose tenets hold the field in Bengal.—Attendant circumstances may be examined to find out the donor's intention of his declaration is ambiguous. But subsequent conduct of Mutwallis is not relevent. (*Mukerjee and Guha JJ.*) DEBENDRANATH SADHU KHAN *v.* NAHARMAL JALAN. **A. I. R. 1930 Cal. 673.**

———The mere juxtaposition of a Takiya to the land sold to the defendants does not prove it to be wakf. *Shadi Lal, C. J., and Abdul Qadir, J.*) SHAFIQUDDIN *v.* MAHBUB ELAHI. **31 P.L.R. 472=12 L.L.J. 149=A.I.R. 1930 Lah. 714.**

A *takia* is a sort of religious institution but every such institution cannot be said to be a wakf. Nor can it be said from the fact that the tomb of a saint is situate therein and people congregate in the shrine during the yearly *mela* that the *takia* is a *wakf*. In determining the question whether the *takia* is a *wakf* the admissions of the persons in management are immaterial. They cannot make the property if it was not really dedicated.(*Abdul Raoof and Moti Sagar, JJ.*) TAFFAZZUL HUSSAIN *v.* GHULAM ALI. **31 Punj. L.R. 250.**

———Wakf property—Evidence of facts and circumstances leading to an inference " user and reputation " is more important. (*Rankin, C.J. and Mukerji, J.*)

MAHOMEDAN LAW—Wakf—Proof of.

BUSOID *v.* NEWAJ AHMED KHAM. **119 I.C. 116 = 33 C.W.N. 439 = A.I.R. 1929 Cal. 533.**

———*Wakf property—To decide title by user, physical features of the property ought to be considered.*

In cases of user of wakf property physical features may be taken into consideration in order to determine whether different parcels may be deemed parts of one waste or common, so as to make evidence of user of one part, evidence of title to the whole : *Deo* v. *Kemp* 2 Bing. (N.C.) 102 ; 9 Mad. 285 ; 15 Mad. 101 (P.C.), Foll. (*Rankin, C.J. and Mukerji, J.*) BUSOID *v.* NEWAJ AHMED KHAN. **119 I.C. 116 = 33 C.W.N. 439 = A.I.R. 1929 Cal. 533.**

———*Whole place dotted with graves—Celebration of majlises in imambara—Quran Khuwan living there—Place never used as residential house—Property is wakf.*

Where the whole place, in so far as its physical appearance was concerned was dotted with graves and the inscriptions on some of the graves showed that they were more than 80 years old and the graves were not only of the relations of the original owner of the house but also of friends, and further the building was not only an imambara in name, but that it had all along been used as such by the celebration of Majlises, and a Quran Khuwan had generally lived there and had occasionally been reciting the holy book and it had never been used as a residential house :

Held : that the house was wakf property. (*Stuart, C. J. and Wazir Hasan, J.*) SAJJAD ALI KHAN *v.* JAGMOHAN DAS. **101 I.C. 563 = 4 O.W.N. 320 = A.I.R. 1927 Oudh 534.**

The mere fact that land is attached to a shrine is no proof of wakf. There must be evidence of dedication. 33 P.R. 1917 Ref. (*Broadway and Martineau, JJ.*) RAHIM BAKHSH *v.* CHANNAN DIN. **4 L.L.J. 511 = A.I.R. 1921 Lah. 390.**

———*Oral dedication.*

An oral dedication may be inferred from repute. 7 A.L.J. 1095 Ref. (*Broadway and Martineau, JJ.*) RAHIM BAKHSH *v.* CHANNAN DIN. **4 L.L.J. 511 = A.I.R. 1921 Lah. 390.**

—Wakf—Religious office.

———*Duty of kazi in respect of.*

Under the Mahomedan law the administration of a religious and public trust is vested in the kazi and it is the duty of the kazi, when he finds that there is no one to administer the trust to see that it is properly administered and for that purpose it is within his competency, and it is proper, that he should appoint a trustee to manage the trust property, (*Suhrawardy and Graham, JJ.*) ABDUL ALIM *v.* MT. ABIR JAN BIBI. **110 I.C. 416 = 55 Cal. 1284 = 32 C.W.N. 835 = A.I.R. 1928 Cal. 368.**

———*Imam—Office of.*

The office of imam is a well-recognized office, and when there is a dispute about it, it is open to the Court to issue a temporary injunction in the interests of the people as well as of the disputants and in order to avoid breach of the peace, but a Court cannot compel by such injunction the Mahomedans of the locality to engage a particular person to officiate at marriages because the presence of the kazi is not of absolute necessity for the validity of a Mahomedan marriage and therefore the people of the locality are not bound to call in any man obnoxious to them : 37 Mad. 228, Rel. on (*Devadoss, J.*) JANA MD. SULEMAN *v.* KADERSA LEVVAI. **106 I.C. 523 = A.I.R. 1927 Mad. 1070.**

MAHOMEDAN LAW—Wakf—Sajjadanashin.

———*Religious office of Kazi is not hereditary.*

The Muhammadan Law does not recognize the right of any person to be appointed as Kazi merely because of heredity; *i.e.*, his being the son or other descendant of a previous Kazi : (Case-law considered). (*Fawcett and Madgavkar, JJ.*) RASAMKHAN *v.* KAJI ABDULLA. **93 I.C. 135 = 50 Bom. 133 = 28 Bom. L.R. 49 = A.I.R. 1926 Bom. 153.**

———"*Kazi*"—*Meaning of.*

(Per *Madgavkar, J.*) A Kazi is, in Muhammadan Law, an officer of the State invested with duties partly judicial and partly administrative. (*Fawcett and Madgavkar, JJ.*) RASAMKHAN *v.* KAJI ABDULLA. **93 I.C. 135 = 50 Bom. 133 = 28 Bom. L.R. 49 = A.I.R. 1926 Bom. 153.**

———*Mullaji of Dawoodi Borah community.*

The Mullaji of the Dawoodi Borah community is not the owner of the bodies, minds, souls and properties of the members of the community either in fact or in law. (*Marten, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* YUSUF ALI EBRAHIM. **84 I.C. 759 = 24 Bom. L.R. 1060 = A.I.R. 1921 Bom. 338.**

—Wakf—Sajjadanashin.

———*Sajjada and Mutwalli—Distinction.*

The sajjada is the head of the institution, the superior of the endowment, the teacher of religious doctrines and rules of life and the manager of the institution and the administrator of its charities. He is not only a mutwalli but also a spiritual preceptor and curator of the shrine where his ancestor is buried. The mutwalli has charge of the secular affairs of the endowment, a mere manager or superintendent appointed to administer the affairs of the endowment and only a procurator having no beneficial interest : 19 Cal. 203 ; A.I.R. 1922 P. C. 123 and A.I.R. 1922 P. C. 384, Rel. on. (*Broadway and Tapp, JJ.*) GAHNE SHAH *v.* MOULA SHAH. **A.I.R. 1930 Lah. 728.**

———*Succession.*

Succession to the office of sajjada does not depend on the ordinary law of property and no right of inheritance can attach to his office. Succession depends on the rules if any made by the founder. Where the rules are not expressed in the deed of endowment, they may be deduced from usage. The usage that must be looked to is the usage that governs the particular institution. The office involving personal qualifications, hereditary succession or succession by primogeniture is out of place. The succession therefore generally goes by appointment. The custom generally in the case of dargas is for the fakirs and murids of the deceased man assembled on the third day of death and assisted by the sajjadas of neighbouring dargas to elect a person and instal him as the successor of the deceased. Where the succession is by appointment it has still to be proved who is entitled to appoint. The appointment may be either by the appropriator or his successor, or executor, or any person pointed out by the founder, or the ruling power. But ordinarily the general usage is for the last incumbent to nominate. (*Broadway and Tapp, JJ.*) GAHNE SHAH *v.* MOULA SHAH. **A.I.R. 1930 Lah. 728.**

———*Sajjadanashin must allow a devotee entrance to the shrine at reasonable hours.*

A sajjadanashin is fully entitled to exercise his right and to perform his duties as such sajjadanashin without any let or hindrance. At the same time one of his duties is to give facilities to the devotees of the shrine to enter its precincts as well as the holy of

MAHOMEDAN LAW—Wakf—Sajjadanashin.

holies at all reasonable hours, so that they may be able to perform their spiritual rites and other devotions in the customary manner: A.I.R. 1922 P.C., 123 (P. C.), Rel. on. (*Broadway and Agha Haidar, JJ.*) KHAWAJA MAHMUD *v.* KHAWAJI HAMID.

115 I.C. 760=A.I.R. 1928 Lah. 778.

——*Officer without office holds courtesy title.*

Where there was no wakf existing, and plaintiff was appointed Sajjadanashin,

Held that the appellation of Sajjadanashin was nothing but a courtesy title. (*Martineau, J.*) ALI MUHAMMAD KHAN *v.* ALI AKBAR KHAN.

69 I.C. 415=A.I.R. 1924 Lah. 382.

Sajjadanashin without waqf holds only a courtesy title. (*Shadi Lal, C. J. and Fforde, J.*) ALI MUHAMMAD KHAN *v.* ALI AKBAR KHAN. **73 I.C. 613=4 Lah. 133=80 I.C. 765=A.I.R. 1924 Lah. 58.**

——*Females cannot be* sajjadanashins.

No woman is qualified to become a *sajjadanashin* whose office involves the performance of religious and spiritual duties, not only those of *pirimuridi* but those of reading the *fateha* and offering prayers and incense in a place of public worship (1919) M.W.N. 662 Dist.; 3 Mad. 95 and 4 M.H.C.R. 23 Foll.

Where the succession is not by inheritance but by appointment or selection a minor cannot be appointed as *muttawalli*. (*Dawson Miller, C. J. and Kulwant Sahay, J.*) KANIZ ZOHRA *v.* SYED MURTAZA HUSSAIN. **77 I.C. 209=2 Pat. 819=1923 P.H.C.C. 241=4 P.LT. 613=A.I.R. 1923 Pat. 576.**

——Khankah, *meaning of*—Sajjadanashin, *rights of*.

A *khankah* is a monastery or religious institution where *dervishes* and other seekers after truth congregate for religious instruction and devotional exercises. It is generally founded by a *dervish* or a *sufi* professing esoteric beliefs, whose teachings and personal sanctity have attracted disciples whom he initiates into his doctrines. After his death he is often revered as a saint, and his humble *takia* (or abode) grows into a *khankah* and his *durgah* (or tomb) into a *rauzah* (or shrine). The *khankah* is usually under the governance of a *sajjadanashin* (the one seated on the prayer mat) who not only acts as *mutwali* (or manager) of the institution, and of the adjoining mosque, but also is the spiritual preceptor of the adherents. The founder is generally the first *sajjadanashin*, and after his death the spiritual line (*silsilla*) is extended by a succession of *sajjadanashins*, generally members of his family chosen by him or according to directions given by him in his lifetime, or selected by the *fakirs* and *murids*, and formally installed; and the income of the institution is usually received and expended by them. On the death of a *sajjadanashin*, his eldest son is not entitled as of right to succeed him; but the eldest son, if qualified, is the natural successor of his father. And, where, the evidence is clear that he was formally recognised and installed by the *pirs* with the express consent and assistance of the opponent, it is not open to the opponent to question his position as *sajjadanashin* or his right to manage the mosque and the property attached to the *khankah*. Dedication may be inferred although the word *wakf* is not shown to have been used.

Ordinarily speaking, the *sajjadanashin* has a larger right in the surplus income than a *mutwalli*, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the *mahant* of a Hindu *math*, has full power of disposition over it. But this does not mean that in every case the whole income from a *khankah* is at the disposal of the *sajjadanashin*; and it is plain from the authorities that at certain shrines the members of the founder's family other than the *sajjadanashin* are treated as entitled to share in the surplus offerings which remain after payment of expenses.

MAHOMEDAN LAW—Wakf—Subject of.

Where the *serais* and *langars* were used for the accommodation of the pilgrims, but were never appropriated to the religious purposes of the *khankah* and were not erected out of the offerings at the shrine and where the *Tumandars* and the arbitrators, all of them skilled in Mohammadan Law, treated these houses as private property and partible, and the parties to the dispute accepted this view and agreed to a partition. *Held*, they must not be treated as *wakf*. (*Viscount Cave.*) KHWAJA MAHUMMAD HAMID *v.* MIAN MAHMUD. **77 I.C. 1009=4 Lah. 15=50 I.A. 92=27 C.W.N. 701=25 Bom. L.R. 660=1 P.W.R. 1923=38 C.L.J. 231=4 L.R.P.C. 24=32 M.L.T. 52=A.I.R. 1922 P.C. 384=44 M.L.J. 149 (P.C.).**

——*Office exists by direction of spiritual founder or custom,*

A Sajjadanashin maintains the unbroken spiritual line from the original preceptor. The office of Sajjadanashin can exist only by virtue of the direction of the spiritual founder or by a valid custom. (*Mookerjee, A.C.J. and Fletcher, J.*) KASIM HASSAIN *v.* HAZRA BEGAM. **60 I. C. 165=32 C. L. J. 151.**

—Wakf—Subject of.

——*'Money' or immovable property.*

Under the Wakf Validating Act a "wakf" can be constituted by permanent dedication of "any property" which expression would include money and other immovable property: 24 All. 190. Appr: 9 Bom. L.R. 1337; 10 C. W. N. 449 and 33 Mad. 118, Dist. (*Mirza, J.*) ABDULSAKUR *v.* ABUBAKKAR.

32 Bom. L. R. 215=A. I. R. 1930 Bom. 191.

——*Wakf of Government promissory notes is valid.*

Government promissory notes can be validly dedicated by way of wakf under the Imamia Law. (*Stuart, C. J. and Raza, J.*) MIZRA MAHOMED SADIQ *v.* FAKHRE JAHAN BEGAM. **117 I. C. 385=3 Luck 521=6 O.W.N. 1251=A. I. R. 1929 Oudh 97.**

Shafi Law—Property subject to mortgage—Wakf is valid. (*Devadoss, J.*) MUHAMMAD AYDROSS CHERIA KOYA THANGAL *v.* ABDUL KADIR. **99 I. C. 367=38 M. L. T. 102=A. I. R. 1927 Mad. 411.**

——*Hanafi Law—'Lawful property', meaning of—Property acquired under a valid contract of sale can be dedicated before actual sale.*

Under the Hanafi law the subject-matter of the dedication must be the lawful property of the wakf at the time that the wakf is made. But the words "lawful property" mean "property of which the person purporting to dedicate it is in lawful possession," and possession under a valid contract of sale is sufficient although actual sale has not been effected.

Further, it is not necessary that the entire subject-matter of the wakf should be actually in the possession of the wakif at the time of the wakf, for the consecrator may validly include in the wakf any property which he may subsequently acquire.

There is a provision of the Muhammadan law to the effect that when a man has made a contract for sale the matter remains in suspense until the sale is effected and, if the sale is subsequently effected the wakf is lawful, even though it is made after a contract of sale, and before the sale has been effected. "A valid sale" made before taking possession and paying the price is clearly nothing more than a contract of sale. (*Stuart,*

MAHOMEDAN LAW—Wakf—Subject of.

C. J. and Raza, J.) MT. BISMILLA BEGAM *v.* MOHAMMADALI MOHAMMAD KHAN. **102 I. C. 77= 4 O. W. N. 360=A. I. R. 1927 Oudh. 162.**

A cemetery cannot be the subject of private ownership. *(Findlay, O. J. C.)* MIR MARDAN ALI *v.* ZARIM KHAN. **93 I.C. 382=A.I.R. 1926 Nag. 337.**

A tomb would not of itself be wakf without an act of dedication. *(Martineau, J.)* ALI MUHAMMAD KHAN *v.* ALI AKBAR KHAN. **69 I.C. 415= A.I.R. 1924 Lah. 382.**

The waqf of cash is valid. 24 All. 190 Foll. *(Daniels and Dalal, A. J. Cs.)* YAQUB BEG *v.* RASUL BEG. **74 I.C. 517=10 O.L.J. 86= A.I.R. 1923 Oudh. 254.**

—Wakf—Validity—Absolute Control.

———*Dedicator retaining absolute control over dedicated property—Waqf is not valid.*

The deed of waqf provided that the executant shall be the first *mutawalli* of the property dedicated and that he shall have power to apply the income of the property dedicated to his own use as long he was alive, and if there was a surplus to apply the same to the purposes specified in any manner he liked. It further stated that he shall also have the power to sell or mortgage the property during his lifetime.

Held, the plain intention of the executant was to retain an absolute power over the property said to have been dedicated and consequently there was no valid waqf. 6 Bom. 42 and 41 All. 1, Foll. *(Gokul Prasad and Kanhaiyalal, JJ.)* AMIRUDDIN *v.* MUZAFFARUL HASSAN. **69 I.C. 641= 20 A.L.J. 897=45 All. 107=A.I.R. 1923 All. 55.**

—Wakf—Validity—Allowance to Mutwalli.

———*Fixing of definite sum as remuneration of Mutwalli is not essential.*

Though it is essential to the validity of the wakf that the settlor should completely divest himself of his proprietary interest in the properties endowed, yet it cannot be suggested that because he provides for the residue to come to him after every expense necessary for the maintenance of the trust has been incurred, that he retains a proprietary interest in the properties dedicated. Failure to fix a definite sum as the remuneration of the Mutwalli is immaterial. But in such a case the Court must see whether the provisions of the Wakfnama enable the Mutwalli, without committing breach of trust, to take anything he likes out of the Wakf properties. If they do—as for instance where the Wakfnamah allows the Mutwalli to appropriate in the first instance whatever he likes for his remuneration and directs the trust to be carried into execution with the residue of the income, —the transaction cannot stand and must be set aside. *(Das and Ross, JJ.)* ISMAIL ALI KHAN *v.* HAMIDI BEGUM. **62 I.C. 455=6 P.L.J. 218= 2 P.L.T. 658=A.I.R. 1921 Pat. 125.**

—Wakf—Validity—Allowance to Strangers.

———*Allowance out of profits to particular person and his descendants—No ultimate charitable object —Wakf fails regarding the allowance.*

Where the language of deed of wakf is unequivocal and the entire property is dedicated to God and an allowance in favour of the plaintiff and his descendants is made payable out of the profits of that property, the wakf to that extent must fail where no charitable or religious object is pointed out in the document at the end to take effect when the descendants fail to exist at any future period of time. *(Wazir Hasan, A. J. C.)* IQBALUR RAHMAN *v.* ALTAFUR RAHMAN. **86 I.C. 703=12 O.L.J. 103= A.I.R. 1925 Oudh 409.**

———*Allowance payable to certain persons out of profits—Allowance charged on property—Wakf fails regarding allowance.*

As soon as a wakf is made the property comes to be vested in the Almighty and it cannot be burdened with any charge which may eventually end in the sale of the property. Thus where the entire property is dedicated to God but it is burdened with a charge for the payment of an allowance of a certain amount from the profits of the property to a certain person and his descendants, the wakf fails to the extent of the provision for the allowance. *(Wazir Hasan, A. J. C.)* IQBALUR RAHMAN *v.* ALTAFUE RAHMAN. **86 I.C. 703=12 O.L.J. 103= A.I.R. 1925 Oudh 409.**

MAHOMEDAN LAW—Wakf—Validity--Life interest.

———*Implied Reversion.*

When the appropriations in a wakf in favour of the author and certain others and the latter's heirs finally fail, there is not an implied reversion to the poor but the appropriations completely fail. *(Dalal and Cuming, A. J. Cs.)* ABDUL MABUD KHAN *v.* NAWAZISH ALI KHAN. **84 I.C. 152=A.I.R. 1925 Oudh 301.**

—Wakf—Validity of—Defrauding creditors.

There is no rule of Mahomedan Law which allows an indebted person to make a wakf of his property with intent to defraud his creditors. Further under the Mahomedan Law the Qazi has the power to make the debtor pay all his debts before he maintains the wakf and the rule under which a manager can be appointed by the Judge to realize the rents and profits and to pay the debts is a mere rule of procedure and not of substantive law and therefore is not as such enforceable. *(Sulaiman and Sen, JJ.)* BISMILLAH BEGAM *v.* TAHSIN ALI KHAN. **124 I.C. 722= 1930 A.L.J. 616=A.I.R. 1930 All. 462.**

Although a waqf may be dedication in favour of God it is still a transfer governed by the Transfer of Property Act as God is a juristic person, and as under the Mahomedan law itself no person can make a waqf of his entire property without making arrangement for the payment of his debts a waqf executed as a device for defeating creditors is governed by S. 53. The provisions of S. 53, do not in any way infringe any rule of the substantive Mahomedan law. *(Sulaiman and Kendall, JJ.)* AHMAD HUSAIN *v.* KALLU MIAN SAJHI FIRM. **117 I.C. 97=1929 A.L.J. 460= A.I.R. 1929 All. 277.**

Per *Niamatulla, J.*—If the deed of wakf is otherwise valid, the intention to defeat the creditors of his heirs cannot affect the validity. *(Sen and Niamat Ullah, JJ.)* IRFAN ALI *v.* BHAGWANT KISHORE. **112 I.C. 623=A.I.R. 1929 All. 180.**

Wakf—Validity—Extent of.

A bequest of more than a third of the testator's estate is valid if there are no heirs. *(Bhide, J.)* ALLAH BAKSH *v.* MUHAMMAD UMAR. **115 I.C. 479= A.I.R. 1929 Lah. 444.**

A *wakf* made in death-illness without the heir's consent is valid only to the extent of a third of the net estate left by the deceased. 35 Cal. 1 (P.C.) foll. *(Mookerjee and Buckland, JJ.)* BIBI JINJIRA KHATUN *v.* MOHAMMAD FAKIR ULLAH MIA. **67 I.C. 77= 49 Cal. 477=26 C.W.N. 749=34 C.L.J. 444= A.I.R. 1922 Cal. 429.**

—Wakf—Validity—Life Interest.

———*Shiah and Sunni Law.*

Mahomedan law applicable to Sunnis clearly allows provisions similar to life interests or other limited interest to be made in a wakf. The Shia Law is the same, with this difference only: that where a series of life interests are created the person taking in the first instance should be one in being and competent to take

MAHOMEDAN LAW—Wakf—Validity — Non-Mahomedan.

beneficially at the time when the wakf is made. (*Kendall and Niamat Ullah, JJ.*) MT. MUSHARRAF BEGAM *v.* MT. SIKANDAR JAHAN BEGAM.

111 I.C. 583=26 A.L.J. 1180=51 All. 40= A.I.R. 1928 All. 516.

—Wakf—Validity—Non-Mahomedan.

Where endowment is publicly made and recognised by Government, a wakf is not to be declared invalid merely on a presumption that there could be no exception to the rule of Mahomedan Law that no wakf can be endowed by a non-Mahomedan: A. I. R. 1924 P.C 109, Ref. *(Wallace and Ananthakrishna Ayyar, JJ).* VENKATASUBBARAYUDU *v.* SILAR SAHIB.

31 M.L.W. 396= A.I.R. 1930 Mad. 582= 58 M.L.J. 524.

Quaere—Whether a grant by a Hindu to a Mohamedan community is incompetent to the foundation of a wakf. (*Lord Shaw.*) MAHOMED RAZA *v.* SYED YADGAR HUSAIN.

80 I.C. 645=21 N.L.R. 1= 1924 M.W.N. 447= 28 C.W.N. 937=51 I.A. 192= 20 M.L.W. 3=7 N.L.J. 116=51 Cal. 446= 34 M.L.T. 83=5 L.R.P.C. 76= A.I.R. 1924 P.C. 109 (P.C.).

—Wakf—Validity—Non-specification of amounts.

There is nothing in the Mahomedan Law to invalidate a wakf, where the objects of the endowment are clear and certain, simply for the reason that no defined portion of the property or specified amounts of the usufruct have been dedicated to charity or other religious, pious or charitable purposes of a permanent character recognized by the Mahomedan Law: 23 All. 233 (P.C.) and A.I.R. 1928 All. 660, Dist. *(Sen and Niamatullah, JJ.)* GHAZANFAR HASANI *v.* MT. AHMADI BIBI.

123 I.C. 369=1930 A.L.J. 109= A.I.R. 1930 All. 169.

—Wakf—Validity—Reservation of benefit.

———*Reservation of benefit to grantor's family or mutwali is not contradictory to Mahomedan Law.*

A quasi public wakf which provides for the benefit of the mutwali or of the family of the grantor as well as for the public benefit of the mosque is not contradictory to Mahomedan Law and the question whether any beneficial interest is retained for the mutwali is one of fact: A. I. R. 1923 P. C. 44; A. I. R. 1916. P.C. 86; A.I.R. 1919 P.C. 62, Foll.; 23 All. 233, Ref. (*Wallace and Anantakrishna Ayyar, JJ.*) VENKATASUBBARAYUDU *v.* SILAR SAHIB.

31 M.L.W. 396= A.I.R. 1930 Mad. 582=58 M.L.J. 524

———*Direction to pay debts charged on wakf property is not a direction to pay settlor's debts—Such wakf is not invalid.*

It cannot be reasonably contended that direction in a deed of wakf, for payment of Government revenue as it falls due, is a direction to pay the settlor's debt, making the wakf invalid. Nor is a direction to discharge certain incumbrances, subject to which the property has been made wakf, a direction to pay the settlor's debt. It is in the nature of a direction for due administration of wakf properties. Where debts are charged on the property made wakf and must therefore be paid out of it, there is no benefit reserved for the settlor in the direction to pay such debts. Payment of such debts by the wakf is a discharge of its own obligation. The case will be otherwise if the settlor makes it a condition that his personal debts for which the wakf property cannot be made liable should be paid, for, in such a case the wakf funds are to be spent on him and would not be so spent but for the condition: 24 All. 257, Ref. (*Kendall and Niamatullah, JJ.*) MT. MUSHARRAF BEGAM *v.* MT. SIKANDAR JEHAN BEGAM.

MAHOMEDAN LAW—Wakf—Validity—Reservation of benefit.

111 I.C. 583=51 All. 40= 26 A.L.J. 1180=A.I.R. 1928 All. 516.

———*Shiah Law—Gift must be perpetual and unconditional—Settlor must give up possession and must not eat out of waqf.*

The Mahomedan law, which only allows a testator restricted powers of disposition over his property, contains no such restriction as regards gifts *inter vivos*, but does not recognize such gifts as valid unless possession is given to the donee. This also applies to waqfs or gifts for religious or charitable purposes, at any rate among Shiahs. Further, in the case of waqfs or gifts for charitable purposes, the Shiah Law imposes a further restriction that the wafik or settlor shall not retain for himself any interest in the subject of the gift. This restriction, for which reasons of a religious character are assigned, undoubtedly operates as a check on the creation of wakfs not from purely religious motives, but with a view of defeating the rights of heirs and transmitting the possession and control of the settlor's property after his death to other persons in the character of mutwallis. This restriction is the last of the four conditions as to the validity of wakfs laid down in the Suraya, the leading Shiah authority, as follows: "(1) It must be perpetual; (2) absolute and unconditional; (3) possession must be given of the mowkoof of the thing appropriated; (4) it must be entirely taken out of the wafik or appropri-ator himself. The wafik must not eat out of the wakf."

Where the settlor, under colour of fixing her salary as mutwalli, was really reserving for her lifetime a portion of the income or usufruct of the property far in excess of what was assigned in the deeds to future mutwallis or could reasonably have been assigned to them.

Held: that it was a clear violation of the condition: 4 N.W.P. 155 held as not good law.

It is an entire departure from the principle that it is a condition of the validity of the wakf that the wafik should not reserve any interest in the endowed property for himself; to hold that where the wafik reserves a portion of the income for himself the wakf only fails as to property sufficient to produce the reserved income and is good as to the rest.

The rule that the settlor when mutwalli can take the salary fixed for mutwallis generally is really no exception; for in that case he takes in his capacity as mutwalli and not in his capacity as settlor. (*Sir John Wallis.*) MT. ABADI BEGUM *v.* MT. BIBI KANIZ ZIANAB.

99 I. C. 669=6 Pat. 259= 54 I.A. 33=25 A.L.J. 51= 1927 M.W.N. 12=4 O.W.N. 153= 8 P.L.T. 107=38 M.L.T. (P.C.) 33= 31 C.W.N. 365=29 Bom. L.R. 763= 25 M.L.W. 710=45 C.L.J. 408= A.I.R. 1927 P.C. 2=52 M.L.J. 430 (P.C.).

Wakf in the name of a mosque—Wakif cannot reserve a benefit for himself (Pullan, J., contra Ashworth, J.)

(*Pullan, J., contra Ashworth, J.*)—Where the wakf is in the name of a mosque the wakf is invalid if the wakif reserves to himself a benefit. (*Ashworth and Pullan, JJ.*) MAHOMED SHAFI *v.* MD. ABDUL AZIZ.

99 I.C. 1052=49 All. 391= 25 A.L.J. 299=A.I.R. 1927 All. 255.

———*Charitable purposes possible only with economic expenditure—Waqf is valid.*

Where under a waqf specific sums are to be paid for the maintenance of worship in a mosque established by the waqif's father, and directions are also given for using the income for the benefit of the travellers

MAHOMEDAN LAW—Wakf—Validity—Reservation of benefit.

and students but the terms of the disposition are such that without scrupulous honesty on the part of the mutwalli, little, if, anything, is likely to be left for the students and the traveller, but there may be a little and in the ordinary course of nature there should be more, the waqf is valid. (*Walmsley and Mukerji, JJ.*) KARIMANNESSA BIBI *v.* HAMIDULLA. **90 I.C. 218=30 C.W.N. 129=A. I. R. 1926 Cal. 401.**

——*Provision made for successive life-estates without ultimate dedication—Waqf is invalid,*

Where a deed purporting to be waqf provides for a succession of life estates in favour of the family of a pious Muhammadan teacher without any ultimate dedication either to the poor or to any other charitable object recognized by the Muhammadan Law, it is reasonable to presume that it was intended thereby to grant successive life-estates rather than to create a permanent disposition of the property which is essential for the constitution of a waqf. (*Walsh and Kanhaiyalal, JJ.*) MD. AFZAL *v.* MD. MAHMUD. **92 I.C. 840=24 A.L.J. 307=A.I.R. 1926 All. 327.**

——*Provision in deed for emoluments and expenses of mutwalli is not unreasonable.*

Where a Mahomedan aged 67 made a waqf reserving a portion for himself and his wife and nominating one of his nephews as mutwalli after him and the other as supervisor and also made arrangements for their expenses and emoluments, *held*, that the waqf was reasonable and cannot be said as brought about by the domination or undue influence on the part of nephews. (*Lord Sumner.*)FIDA RAZUL *v.* YAKUB BEG. **87 I.C. 702=6 L.R. P.C. 55=12 O.L.J. 98=27 O.C. 346=A.I.R. 1925 P.C. 101. (P.C.)**

——*Reserving power to settlor to amend rules is not invalid—One clause invalid—Whole wakf does not become invalid.*

Where the Mutwallis were not to get possession until after the wakif's decease and then only for 70 days, after which they were to let out the property on monthly rents, and the period of 70 days was to be spent in prayer for the wakif's benefit, and for feeding the poor,

Held: that there was nothing contrary to Muhammedan Law in these clauses. According to the school of Abu Jusuf, the wakf was completed by the wakif's dedication. His changing the character of his possession from mere owner to trustee or mutwalli, was, in the circumstances, adequate, coupled with the fact that he did, as a matter of fact, carry out several of the objects of the deed, while he was alive. Reservation of a very wide power to the wakif to amend the rules of the wakf is not in any way inconsistent with a complete dedication of the *corpus* of the property to God.

Held: further that even if there is an invalid clause, or if there are invalid clauses, in the wakfnamah this will not vitiate the wakf. Even if the wakif had committed breach of trust in regard to the income of the property, this would be immaterial and would not have invalidated the wakf, if a wakf had been constituted and perfected by the wakfnamah. (*Duckworth and Godfrey, JJ.*) MA E KHIN *v.* MAUNG SEIN **88 I.C. 167=2 Rang. 495=A.I.R. 1925 Rang. 71.**

——*Right to change rents and profits reserved to settlor alone—Wakf is not invalid.*

Where one of the clauses in the deed emphasised the irrevocability of the wakf and reserved to the wakif alone, during his life, the right of making any alterations in regard to the rents and profits of the buildings and land or anything relating to the said buildings and land, or the donations, rules *etc.*, laid down in the deed,

Held : that the clause was not invalid, as, when the deed as a whole was read this clause did not betoken the reservation of power to change the *corpus* of the property, and that there can, according to Mussulman Law, be a power of alteration reserved by of the wakif in this manner in the wakfnamah. *(Duckworth and Godfrey, JJ.)* MA E KHIN *v.* MAUNG SEIN. **88 I. C. 167=2 Rang. 495=A. I. R. 1925 Rang. 71.**

——*Provision for maintenance of relatives and dependents does not invalidate.*

A dedication for the purposes of charity, including maintenance of relatives and dependents, and for the reading of the *fateha* for the salvation of the soul of dedicator constitutes a valid waqf. (*Rafiq and Stuart JJ.*) MUKARRAM ALI *v.* ANJUMAN-UN-NISSA BIBI AND ASGHARALI KHAN. **69 I. C. 836=45 All. 152=20 A. L. J. 924=A. I. R. 1924 All. 223.**

——*Reservation of life interest to settlor and his wife is valid.*

In the case of a waqf during the lifetime of the settlor and his wife the amount to be spent on charitable and pious purposes was left entirely to their discretion, both as to the sum to be expended and as to the purposes for which it was to be spent. They were to spend as much of the profits as they deemed proper on charitable and pious purposes recognised by Mahomedan Law and the remainder for their support and no one was to have the right to call them to account. After their death the objects of the wakf were carefully specified and were proper objects, and the mutwalli was directly bound to spend the money on those objects.

Held, that the waqf was valid, 1 Fulton 345 Foll. 36 B. 214 and 17 C. 498 (P. C.), Cons. (*Ryves and Daniels JJ.*) MAHOMED ZAIN *v.* NURUL HASSAN. **74 I. C. 142=43 All. 682=21 A.L.J. 650=4 L. R. A. (Civ.) 320=A. I. R. 1924 All. 113.**

——*Waqf to the family in perpetuity—Failure of—Charges, as substitutes by agreement—Validity.*

In 1846 and 1868 two deeds came into existence purporting to be *waqfnama* and creating perpetual succession of interests in the family of the donors. Dispute having arisen in 1881, the matter was compromised whereby the *Mutwali* was confirmed in the possession of valuable properties and he was to pay certain named persons of the family and their heirs a fixed monthly allowance.

Held, the principal purpose of the agreements was to secure to living and named persons certain fixed allowances which were to become payable immediately and were to continue to their heirs. It is true the agreements purported to confirm the *waqfnama* and the allowances were made payable by the hand of the *Mutawali* of the *waqfnama* out of the income accruing to him from the properties thereby settled, but the allowances were intended to take effect as immediate and heritable charges and the direction, to pay the allowances " out of the income" of the settled properties, which appear in the agreements, shows an intention to create a charge not to be frustrated by an ineffectual attempt to keep alive the subsequent and invalid limitations of the settlement. Such an agreement, by which members of the family surrendered their claims to the property of considerable value is not subject to the restrictions affecting gifts among Mahomedans, but is a contract creating a charge on lands which may be enforced like other charges by the Courts. It is consistent not

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only with law, but with equity, justice and good conscience that the agreements should be observed. (*Viscount Cave.*) KHAJEH SULEMAN QUADIR *v.* SALIMULLAH BAHADUR. **69 I. C. 138= 31 M.L.T. 79= 24 Bom. L. R. 1257= 49 Cal. 820=49 I. A. 153=27 C.W.N. 101= 21 A. L. J. 1=37 C. L. J. 56= A. I. R. 1922 P.C. 107=43 M. L. J. 385.**

—Wakf—Validity—Specified locality.

——*Gift for public purposes in a specified locality is valid.*

Although a gift for public purposes generally is void as being so general and undefined that it cannot be executed by the Court, yet a gift for public purposes in a specified locality is a valid charitable gift. (*Marten, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* YUSUF ALI EBRAHIM. **84 I.C. 759= 24 Bom. L.R. 1060=A.I.R. 1921 Bom. 338.**

—Wakf—Validity—Substantial dedication.

Where out of an income of Rs. 22 and odd per month Rs. 2 per mensem were directed to be given to a relation of the wakif and the remaining income had been directed to be devoted to purposes of the mosque,

Held: it was impossible to hold that the wakf was an illusory one. (*Broadway and Abdul Raoof, JJ.*) TAFAZZAL BEG *v.* MAJID ULLAH. **79 I.C. 120= 5 Lah. 59=A.I.R. 1924 Lah. 432.**

——*Substantial part given to charity—Waqf is valid.*

Where the provision intended to benefit the family of the settlor was not the preponderating feature of the settlement, nor was the provision made for the perpetuation of religious and charitable gifts by any means illusory or unsubstantial, *held* that a valid wakf was created. (*Lord Sumner.*) ABDUR RAHIM *v.* NARAYAN DAS. **71 I.C. 646=17 M.L.W. 509= 50 I.A. 84=32 M.L.T. 153=25 Bom. L.R. 670= 1923 M.W.N. 441=50 Cal. 329=38 C.L.J. 242= 28 C.W.N. 121=A.I.R. 1923 P.C. 44= 44 M.L.J. 624 (P.C.).**

——A substantial dedication of property to charitable and religious purposes is in the absence of any legal objection, valid under the Mahomedan Law. (*Viscount Cave.*) ABDUL HAFIZ *v.* ABDUL ALIM. **59 I.C. 1=24 C.W.N. 494= 28 M.L.T. 135=12 M.L.W. 497=32 C.L.J. 447= A.I.R. 1920 P.C. 87=1920 M.W.N. 324 (P.C.)**

—Wakf—Validity—Uncertainty.

A wakf created in favour of objects of khairat is void and unenforceable on the ground of vagueness and uncertainty: 75 P.R. 1907 and *Sidik Hoosein* v. *Haji Sulleman Abdul Wahid*, Bom. Suit No. 604 of 1902 Appr.; A.I.R. 1929 Bom. 127 Rel. on. (*Rupchand, A.J.C.*) MAHOMEDALLY EBRAHIMJI *v.* LAKHMICHAND ISSARDAS. **111 I.C. 882= 23 S.L.R. 207=A.I.R. 1929 Sind 52.**

—Wakf—Who can create.

——*Bombay Dawoodi Borah can create wakf.*

A Bombay Dawoodi Borah is not prevented from doing what every other Mahomedan British subject may do, *viz.*, to create a binding and irrevocable wakf or trust in favour of charity. (*Marten, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* YUSUF ALI EBRAHIM. **84 I.C. 759=24 Bom. L.R. 1060= A.I.R. 1921 Bom. 338.**

—Wakf—Miscellaneous.

——*Member of founders family—Rights of.*

Hindu debutters and Mohammedan wakfs are not on the same footing and the fact that the plaintiff is a member of the family of the founder has, in the case of a Mohamedan, no bearing upon his right to bring a suit to declare a wakf valid or particular property is wakf property. (*Rankin, C.J. and Mukerji, J.*) F.A. SHIKAN *v.* ABDUL ALIM ABED. **34 C.W.N. 1129.**

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——"*Tamlik*"—*Meaning of.*

The word "Tamlik" is very often popularly used in the sense of a settlement in the case of trust properties. Where a disciple is appointed as successor to the mutwalliship and trust property is made over to him, the transaction can well be described by the use of the word "Tamlik". (*Shrivastava and Gokaran Nath Misra, JJ.*) MD. WAZIR KHAN *v.* MD. HUSAIN. **111 I.C. 805=A.I.R. 1929 Oudh 65.**

——*Practice—Powers of District Judge.*

The practice of invoking the power of a District Judge as a kazi in connexion with matters of public and religious trusts under the Mahomedan law has become general and it cannot now be doubted that in a proper case the Judge should exercise the powers which he does possess. (*Suhrawardy and Graham, JJ.*) ABDUL ALIM *v.* MT. ABIR JAN BIBI. **110 I.C. 416=55 Cal. 1284=32 C.W.N. 835= A.I.R. 1928 Cal. 368.**

Property set aside for religious purposee and its income spent for those purposes—Wakif spending as a fact tor those purposes—Presumption is that income from such properties was expended. (*Stuart, C.J., and Raza, J.*) MT. BISMILLA BEGUM *v.* MUHAMMADALI MUHAMMADKHAN. **102 I.C. 77= 4 O.W.N. 360=A.I.R. 1927 Oudh 162.**

——*Crown Grants Act* (1895)—*Original endowment by wakf made by former ruler maintained by Government but certain conditions about resumption imposed—Property does not cease to be wakf property.*

Where certain property was endowed by the Kings of Delhi for the purpose of a wakf and subsequently the grant was maintained by the Government but certain conditions were attached to it:

Held: that the fact that the Government laid down certain conditions in the sanad granted by it to the effect that in certain conditions the grant was to be resumed, could not mean that the property, which had been created as endowed or wakf property by the Kings of Delhi and Oudh and subsequently maintained by the British Government, ceased to be wakf owing to the imposition of such conditions. (*Wazir Hasan and Gokaran Nath Misra, JJ.*) SHAH MOHAMMAD NAIM ATA *v.* MOHAMMAD SHAMSHUDDIN. **100 I.C. 241=4 O.W.N. 116=2 Luck. 109= A.I.R. 1927 Oudh 113.**

Wakf—Institution is distinct from property attached to it—Removal of gaddinashin does not imply physical dispossession from property of institution: 56 P.R. 1895 and 95 P. R. 1916, Foll. (*Martineau, J.*) MT. HUSSAIN BIBI *v.* NUR HUSSAIN SHAH. **94 I.C. 212 (Lah.)**

——De facto *manager can get decree for possession of properties of mosque if right of mosque is conceded.*

Where a *de facto* manager of a mosque brings a suit on behalf of the mosque for possession of properties belonging to the mosque and the right of the mosque is conceded, he is entitled to a decree: 63 I. C. 171; A.I.R. 1924 All. 59, Foll. 34 All. 213 P. C., Dist. (*Viswanatha Sastri, J.*) MD. IBRAHIM *v.* SUNDARAM CHETTI. **96 I. C. 823= A.I.R. 1926 Mad. 1066.**

——*Shias—Suit for declaration of trust in favour of poor—All Shias are interested.*

In a suit for a declaration of trust in favour of poor Shias the interests of all Shias are identical. It may be that if there is a trust it is the poor Shias who are

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the beneficiaries, but the entire Shia community is interested to have the trust declared even if it be a trust in favour of the Shia poor, and it is impossible to distinguish, or to infer a conflicting interest, between those who are actually poor and those who are only potentially so. (*Das and Ross, JJ.*) KHURSAIDI BEGUM *v.* SECY. OF STATE. **94 I.C. 433 = 5 Pat. 539 = 7 P.L.T. 679 = 1926 P.H.C.C. 145 = A.I.R. 1926 Pat. 321.**

——*'Fakir' 'Khankah' and 'Dargah'—Meaning of.*

The word 'Fakir' does not mean beggar but it means a holy person who has relinquished the world and devotes his time to imparting religious instructions to his disciples and others. The place of abode of a Fakir is called a takia before he attains sufficient public importance and a large number of disciples begin to get round him and lodgment is provided for such disciples, then the place is called a Khankah and then if the fakir on his demise is buried in the Khankah it becomes a Dargah. (*Abdul Raoof and Jailal, JJ.*) HUSSAIN SHAH *v.* GUL MUHAMMAD. **88 I.C. 816 = 6 Lah. 140 = A.I.R. 1925 Lah. 420.**

——*Words—"Wali" means "saint and includes saint of lower degree.*

The word "wali" has substantially the same meaning as "saint". The expression "wali" is not confined to saints of the highest degree, but includes saints of lower degree. (*Marten, J.*) ADVOCATE-GENERAL, BOMBAY *v.* YUSUF ALI EBRAHIM. **84 I.C. 759 = 24 Bom. L. R. 1060 = A.I.R. 1921 Bom. 338.**

—Will—Bequest.

——*Cutchi Memon—Provisions of Mahomedan Law are inapplicable.*

Contingent legacies contained in the will of a Cutchi Memon are not void as the right of disposition of all his property has been acquired by him by custom and this right cannot be curtailed by applying the provisions of Mahomedan Law to such wills: A.I.R. 1927 Bom. 542 (Obiter dicta not approved). (*Mirza, J.*) ABDUL SAKUR *v.* ABUBAKKAR. **32 Bom. L. R. 215 = A.I.R. 1930 Bom. 191.**

——*Sunni Law—Devise of a Life estate—Effect.*

Under Mahomedan Law applicable to Sunnis no life estates are recognized and that when a life estate is given the effect is that a full share is transferred. The effect of a devise of a life interest in favour of the widows is to pass an absolute property in their favour. It therefore follows that a widow has full power to alienate the property and that the alienations made by her cannot be called in question: 28 All. 342; A.I.R. 1922 All. 205; A.I.R. 1924 All. 20; 19 O.C. 319; A.I.R. 1925 Mad. 997 and 1 Lah. 302, Ref. (*Staples and Mohiuddin, A. J. Cs.*) ABDUL RAHIMAN *v.* ABDUL HAFIZ. **121 I.C. 35 = A.I.R. 1929 Nag. 313.**

——*Shia Law allows existence of number of limited estates.*

Shia law admits of the existence of a number of limited estates one after another and consequently the interposition of life estates, before the estate comes as a life estate to third persons, raises no legal difficulty and does not involve the necessity of holding that on the expiry of the life estates the estate in the third persons was an absolute estate. (*Raza and Pullan, JJ.*) HANUMAN SAHU *v.* ABBAS BANDI BIBI. **120 I. C. 387 = 6 O. W. N. 169 = 4 Luck. 452 = A. I. R. 1929 Oudh 193.**

——Legatee dying before testator—Legacy descends to legatee's heirs if not revoked. (*Dalal and Pullan, JJ.*) HUSENI BEGAM *v.* MAHOMED MEHDI. **100 I. C. 673 = 49 All. 547 = 25 A. L. J. 382 = A. I. R. 1927 All. 340.**

MAHOMEDAN LAW—Will—Consent.

——*Life estate with vested remainder cannot be created.*

The creation of a life estate with a vested remainder is not consistent with the Muhammadan law. A trust can be created subject to which a legatee could take a bequest, but the words must be explicit for the purpose of creating a trust. 17 W. R. 525 (P.C.); 41 B. 372 and 32 A. 172 Ref.; 15 W. R. 146 and 2 C. 184 (P.C.) Foll. (*Spencer and Devadoss, JJ.*) ABDUL RAHIMAN *v.* UTHUMANSA ROWTHER. **85 I. C. 945 = A. I. R. 1925 Mad. 997.**

——*Bequest to heirs and Strangers—Validity.*

Under the Mahomedan Law, in a bequest made to an heir and a stranger, the portion of the bequest with respect to the heirs is not valid without the consent of the other heirs, and that with respect to the strangers it is valid without such consent, if it does not exceed one-third of the estate; otherwise the consent of the heirs is requisite to the validity of the bequest. (*Banerji and Tudball, JJ.*) MUHAMMAD JUNAID *v.* AULIA BIBI. **61 I. C. 947 = 42 All. 497 = 18 A. L. J. 613.**

—Will—Consent.

——*Whole property bequeathed to sons of insolvent heirs with their consent—Will operates only with respect to one-third and receiver can attach two-thirds.*

Where a Mahomedan testator wills away whole of his property in favour of the sons of his heirs, who are declared insolvents, and who consent to its being so willed away presumably to save property from going in the hands of the receiver, the will operates only as to one-third, the two-thirds vesting in the receiver in insolvency. (*Mukerji and King, JJ.*) KALI CHARAN *v.* MD. JAMIL. **122 I. C. 762 = 1930 A. L. J. 588 = A. I. R. 1930 All. 498.**

——A will in favour of heirs not assented to by them after testator's death is invalid. (*Tek Chand and Agha Haider, JJ.*) MUHARRAN ALI *v.* BARKAT ALI. **A. I. R. 1930 Lah. 695.**

——*Shia Law—Consent may be signified by conduct.*

A will made by a Shia of more than one-third of his estate is invalid unless it is made with the consent of all the heirs either before or after death, and such consent of an heir to such a bequest may be signified by conduct showing a fixed and unequivocal intention. 26 Bom. 497, Ref. (*Pullan, J.*) MAHOMED ALI KHAN *v.* NISAR ALI KHAN. **109 I. C. 835 = 1 L. C. 592 = A.I.R. 1928 Oudh 67.**

——*Shias—Legacy exceeding one-third is invalid unless all heirs consent—Consent may be given before or after death.*

According to the Shia law a testator can leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of the other heirs, but where it exceeds one-third, it is not valid, without the consent of all the heirs. Such consent may be given either before or after the death of the testator: 30 All. 153, Dist. (*Dalal and Pullan, JJ.*) HUSENI BEGAM *v.* MAHOMED MEHDI. **100 I. C. 673 = 49 All. 547 = 25 A. L. J. 382 = A. I. R. 1927 All. 340.**

——*Bequest to heir is void unless other heirs consent after death.*

Under Mahomedan law a bequest to a person entitled to inherit is void unless the other inheritors give their consent after the death of the testator to its taking effect. (*Campbell, J.*) RAMZAN *v.* KAMAL. **101 I.C. 570 = A.I.R. 1927 Lah. 776.**

——*Will—Bequest of more than 1/3rd of the testator's property in favour of heirs is invalid unless*

MAHOMEDAN LAW—Will—Consent.

other heirs consent expressly or impliedly after testator's death.

Under the Sunni Law a testamentary disposition by a Mussalman is invalid in so far as it purports to dispose of more than one-third of the testator's estate or to benefit any of his heirs unless the heirs whose rights are affected by such disposition consent to it after his death expressly or impliedly or by passive acquiescence. Consent during life is not enough under the Sunni Law.

The policy of Muhammadan Law appears to be to prevent a testator from interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a thirds to a stranger. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to show very clearly that the forms of the Muhammadan Law, whereby its policy is defeated, have been complied with. *(Spencer and Devadoss, JJ.)* ABDUL RAHMAN *v.* UTHUMANSA ROWTHER. **85 I.C. 945= A.I.R. 1925 Mad. 997.**

———*Consent prior to death of the testator—Effect.*

Under Mahomedan Law, bequests can only take effect to the extent of one-third of the next assets after payment of funeral expenses and debts, unless the excess is rendered valid by the consent, given after the death of the testator, of the inheritors whose rights are infringed thereby. A consent prior to death is of no avail, because rights of inheritance vest in the heirs only after death and a prior release or renunciation is prohibited under the Mahomedan Law, *(Kincaid, J.C. and Raymond, A.J.C.)* MT. BHAGBHARI *v.* MT. KHATUN. **80 I.C. 118= A.I.R. 1921 S. 177. 16 S.L.R. 25.**

———*Burden of proof.*

The Mahomedan Law does not allow a testator to leave a legacy to any of his heirs unless the other heirs agree, but any single heir may so agree as to bind his own share, and the burden of proving the consent of a particular heir is upon the legatee. *(Lord Phillimore.)* A. F. SALAYJEE *v.* PATIMA BIBI.

71 I.C. 753=32 M.L.T. 96=25 Bom. L. R. 301= 37 C.L.J. 302=18 M.L.W. 44= 1923 M.W.N. 522=1 Rang. 60=4 L.R.P.C. 38= 28 C.W.N. 31=2 Bur. L. J. 1= A.I.R. 1922 P.C. 391=44 M.L.J. 332 (P.C.)

———*Life estate to wife if testator died childless and residue to stranger—No consent by heirs—Will is invalid.*

Where, under the terms of the Will, the testator's wife was to succeed to a life estate and a stranger was to obtain the residue, *Held*: the terms of the Will are unenforceable. The wife was an heir but the heirs did not consent to the Will and the Will purports to create a life estate and a reversionary interest, both of which are unknown to the Muhammadan Law. The bequest would not be good in respect to one-third of the property, because the Will shows a distinct intention that he should take nothing until after the death of the wife. *(Stuart, J.)* ALLAH DIA *v.* ABDUL GAFUR. **69 I.C. 848=. A.I.R. 1922 All. 283.**

———*Consent of insolvent heir validates bequest.*

When the consent of the heirs of a Mahomedan is signified to a bequest in a will in favour of an heir, the legatee takes from the testator. The consent does not operate as a transfer by the heirs signifying their consent. Where the consenting heirs are insolvents their consent is equally effective in validating the bequest and the property vests in the legatee and not in the Receiver. *(Piggott and Walsh, JJ.)* AZIZ-UN-NISSA BIBI *v.* O. M. CHIENE. **59 I.C. 296= 42 All. 593=18 A.L.J. 745= 2 U.P.L.R. 251. (All.)**

MAHOMEDAN LAW—Will—Construction.

———*Assent may be indirect.*

Bequests by a Moslem can only take effect to the extent of one-third of the net assets remaining after payment of his funeral expenses and debts, unless the excess is rendered valid by the consent, given after the death of the testator, of the inheritors whose rights are infringed thereby, and a bequest to a person entitled to inherit is void unless the other inheritors give their consent, after the death of the testator, to its taking effect. Assent indirectly given may be a good assent in the eye of law, 4 S.L.R. 216, 26 Bom. 497, Foll. *(Kincaid, C. J. and Raymond, A. J. C.)* MT. BHAGHARI *v.* MT. KHATUMAL. **80 I.C. 118= 16 S.L.R. 25=A.I.R. 1921 Sind 177.**

—Will—Construction.

———*Power to adopt given to widow with proviso depriving her of benefits under will on her remarriage—Widow remarrying—Adoption after remarriage is invalid.*

Where a power to adopt was given to a Mahomedan widow by a will of her husband which stated that in case of remarriage the widow would not be entitled to avail herself of any of the provisions of the will, the widow forfeited such right of adoption on her remarriage, and any adoption after her remarriage is invalid. *(Stuart, C. J. and Wazir Hasan, J.)* ABDUL HAKIM KHAN *v.* SADAT ALIKHAN. **112 I.C. 596= A.I.R. 1929 Oudh 126.**

———Before the Mussalman Wakf Validating Act; the testator by his will purported to disinherit his female issue but gave each of them a life annuity for maintenance and the executors were directed not to sell or alienate any of the immovable properties, which were all to be divided equally among the sons of the deceased, subject to the payment of the life annuity to the daughters and their marriage expenses. The properties were purported to be settled "in entail" on the sons. It appeared that it was his intention to create a family settlement in the nature of a wakf-alal-aulad in favour of his sons and their male descendants. There was no provision on failure of the sons and their descendants for the property to go to charity:

Held: the family settlement created by the will was clearly invalid. If the disposal was not to be regarded as a family settlement, but as a disposal in favour of the sons whose life estates automatically become absolute estates under the Sunni Hanafi Law, the disposal would then be invalid as being bequests in favour of heirs to which the other heirs did not consent after the testator's death. *(Mirza, J.)* AZIMUNNISA BEGUM *v.* SIRDAR ALI. **102 I.C. 129= 29 Bom. L.R. 434=A.I.R. 1927 Bom. 387.**

———*Shia Law—Will of life estate in entire property is equivalent to will of entire property.*

A testator provided that his wife should be in possession of the whole of the estate for her life-time, and that after her death his daughter's daughter would be the owner (malik) of the property; and after her, her male issue and failing male issue female issue would get the property, and failing these the grandsons of the sister would get it.

Held: that the will must be deemed to be a will of the entire property to the exclusion of daughter's daughter and unless she can be held to have assented to the will it would not be valid even as regards one-third. 30 All. 153 Foll. *(Banerjee, Ag. C. J. and*

MAHOMEDAN LAW—Will—Construction.

Piggott, J.) MT. AMRIT BIBI *v.* MUSTAFA HUSSAIN.
77 I.C. 66=21 A.L.J. 750=4 L.R.A. (Civ.) 496=46 All. 28=A.I.R. 1924 All. 20.

———*Life interest conferred by grant—Grantee dying—Estate reverts to grantor and not to heirs of grantee's father.*

The plaintiffs' case was that at the Settlement in 1868 a life-interest only was conferred on their mother K and her step mother R and on their death, the property reverted to them; *Held*: even if the grant were limited to a life-interest, it was nowhere stated that the heirs of K or those of her father S were to be the reversioners, *Held* further that if the grant to K were for her life only then, unless it is otherwise stated, on her death the estate reverts to the grantor, that is the Government, and not to her heirs nor to those of her father, (*Hallifax, A.J.C.*) RAHIM BAKSH *v.* SHIOCHARAN. **A.I.R. 1923 Nag. 132.**

—Will—Extent of heir's right.

———*He cannot restrict heir's right of unrestricted enjoyment even if his intentions are laudable.*

A Mahomedan can only dispose of one-third of his estate by will and cannot interfere with the devolution of property according to law among the heirs. A Mahomedan testator cannot, by a testamentary disposition reduce or enlarge the shares of those who are entitled to inherit. The right of adult Mahomedan heirs to the unrestricted enjoyment of the property they inherit is unassailable.

A testator by his will left one-third of his property to charity. The remaining two-thirds was placed in the hands of a trustee to invest and some of the income from the investment was directed to be paid by the trustee to the heir, who was a person of weak intellect.

Held: that the testator had no power to do so in spite of his laudable intentions. (*Pratt, Offg. C. J. and Cunliffe, J.*) E. C. JEEWA *v.* H. H. YACOOB ALLY. **114 I.C. 303=6 Rang. 542=A.I.R. 1928 Rang. 307.**

———*Legacy made of one-third of estate—Estate means estate with acquisitions made out of it at date of suit and not as it was at date of death.*

One Y made a will by which he left one-third of the portion of the property, of which he was competent to dispose, to be dealt with for charitable purpose. His executor bought out of the estate certain property known as the Puzandaung property and he then sold all the remaining assets of the estate except the Puzandaung property for a sum one-third of which represented Rs. 1,64,600. In a suit for a declaration that the gift to the charity was bad and that a partition of the estate should take place. The Court of first instance decided that the gift to the charity was good and directed that the charity should be entitled to one-third of the estate of the testator as it existed at the date of his death. In other words it assumed that the effect of the will was to give to the charity, not one-third part of the estate, but a sum that would be measured by ascertaining what one-third part of the estate would be at the date when he died.

Held, the will is incapable of bearing any such interpretation and that the charity is entitled to one-third of the whole of the estate, *viz.*, one-third of the Puzandaung property and Rs. 1,64,600 representing one-third of the proceeds of the property which was realised together with interest on that sum at 6 per cent from that date. (*Lord Buckmaster.*) MIRZA MD. *v.* OFFICIAL ASSIGNEE. **77 I.C. 755=18 M.L.W. 277=33 M.L.T. 370=1923 M.W.N. 716=A.I.R. 1923 P.C. 146 (P.C.)**

MAINTENANCE ORDERS ENFORCEMENT ACT, (1921), S. 7—Evidence.

———*Right of heirs is only to two-thirds after assets are realised after payments and debts of funeral expenses.*

Where executors have been appointed the right of the heirs is not to an aliquot two-thirds of all the testator's assets at his death. The debts and funeral expenses etc., have first to be paid and then the estate realised, and it is only to two-thirds of such net assets that the heirs are entitled. Consequently until such two-thirds are ascertained the executor is *prima facie* entitled to exercise his wide powers of disposition under S. 90 of the Probate and Administration Act. (*Marten and Fawcett, JJ.*) SIR MAHOMED YUSUF *v.* HARGOVANDAS JIVAN. **70 I.C. 268=24 Bom. L.R. 753=47 Bom. 231=A.I.R. 1922 Bom. 392.**

—Will—Probate.

No probate is necessary for proving a Mahomedan will. (*Duckworth and Godfrey, JJ.*) MA NYUN *v.* CHITHAMBARAM CHETTIAR. **84 I.C. 1007=2 Rang. 572=A.I.R. 1925 Rang. 132.**

———There is no provision of the law which renders obligatory in the case of a Mahomedan will to take probate after due proof. The will is admissible in evidence, notwithstanding that the grant of probate has not been obtained. I. L. R. 8 Bom. 241 (1884); I. L. R. 37 Cal. 839 (1910); A.I.R. 1922 Bom. 392. (*Mookerjee and Chotzner, JJ.*) SYED ABDUL AHMED ABED *v.* BADARUDDIN ABED. **86 I.C. 1023=28 C.W.N. 295=A.I.R. 1924 Cal. 757.**

MAIMING.

See PENAL CODE.

MAINTENANCE.

See (1) CIVIL P. C. S. 60.
(2) CRIMINAL P. C, S. 488.
(3) HINDU LAW—MAINTENANCE.
(4) MAHOMEDAN LAW—MAINTENANCE.

MAINTENANCE GRANT.

See GRANT—MAINTENANCE.

MAINTENANCE ORDERS ENFORCEMENT ACT (XVIII of 1921.)

—S. 7—Evidence.

———*General power of taking further evidence is not affected by S. 7.*

Fawcett and Mirza, JJ.—S. 7 deals with the opportunities to be allowed to the person affected by the provisional order to oppose its confirmation, and naturally, therefore, provides for the call of further evidence being taken when necessary for the purpose of defence, but the general power to call for further evidence in other cases, which is implied by sub-S. (4) S. 3 of the English Act, 1920 is not thereby affected. In a case where the evidence before the Indian Court cannot be tested by cross-examination and introduces matter not mentioned in the evidence on which the provisional order is based, the order of the Magistrate for further evidence is desirable. (*Patkar and Baker, JJ. afterwards Fawcett and Mirza, JJ.*) PANDURANG AND KATTI *v.* KATTI. **109 I.C. 337=52 Bom. 262=10 A.I.Cr.R. 179=29 Cr. L.J. 513=30 Bom. L.R. 350=A.I.R. 1928 Bom. 117.**

———*Evidence of desertion subsequent to provisional order can be considered.*

Fawcett, J.—Sub-S. (4), S. 7 contemplates evidence of desertion subsequent to the provisional order for maintenance being taken into consideration, for it is relevant to the question whether there has been a real desertion, and the Court can either refuse to confirm the provisional order or confirm it without modification, or with such modifications as to the Court, after hearing the evidence, may seem just

MAINTENANCE ORDERS ENFORCEMENT ACT, (1921), S. 7.—Revision.

(*Patkar and Baker, JJ., afterwards Fawcett and Mirza, JJ.*) PANDURANG S. KATTI *v.* KATTI.
109 I.C. 337=52 Bom. 262=10 A. I. Cr. R. 179=29 Cr. L.J. 513=30 Bom. L.R. 350=A.I.R. 1928 Bom. 117.

—S. 7—Revision.

———*Order of Chief Presidency Magistrate confirming order of maintenance is revisable by High Court,*

Patkar and Baker, J.—The order confirming a provisional order of maintenance of the Chief Presidency Magistrate is a judicial and not merely an executive or administrative order, and the High Court has jurisdiction to interfere with the order of the Chief Presidency Magistrate in revision. (*Patkar and Baker, JJ., afterwards Fawcett and Mirza, JJ.*) PANDURANG S. KATTI *v.* KATTI. **109 I.C. 337=52 Bom. 262=10 A.I. Cr. R. 179=29 Cr. L.J. 513=30 Bom. L.R. 350=A.I.R. 1928 Bom. 117.**

MAJORITY.

See (1) HINDU LAW—MAJORITY AND GUARDIANSHIP.
(2) MAHOMEDAN LAW—GUARDIANSHIP.
(3) MAJORITY ACT.
(4) MINOR.

MAJORITY ACT (IX of 1875).

—S. 2—Applicability.

———*Adoption by ward over 18 and below 21 is valid.*

A Hindu minor under the Court of Wards, if over 18 but below 21, can validly adopt, without the consent of the Court of Wards.

As regards questions of marriage, adoption etc., the capacity of minors being left untouched by the Indian Majority Act, S. 2, the raising of the age of Majority by S. 3 from 18 to 21 in case of minors under the Court of Wards, has no effect on those matters. (*Spencer and Ramesam, JJ.*) ARULANANDA MUTHU *v.* PONNUSWAMI. **66 I.C. 265=15 M.L.W. 237=1922 M.W.N. 93=A.I.R. 1922 Mad. 1=42 M.L.J. 129.**

—S. 2—'Capacity to Act.'

———*Meaning—A minor can delegate to his wife the power of divorce.*

The Majority Act does not use the expression "capacity to contract" but " capacity to act " which is of much wider import. The expression includes also capacity to contract. Adopting this view of the meaning of the expression " capacity to act in the matter of divorce " a minor can delegate to his wife the power of divorce : 22 Bom. 430, Rel. on. (*Cuming and Mukerji, JJ.*) MT. FATIMA KHATUN *v.* FAZLAL KARIM. **110 I.C. 52=47 C.L.J. 372=A.I.R. 1928 Cal. 303.**

———*Majors under Personal Law though not under that can fix amount and nature of dower.*

Section 2 has reserved to those who have attained majority under their personal law, though not under the Act, the right to act as majors in matters of marriage and dower ; the fixing of the amount of the dower is an act in the matter of the dower. (*Suhrawardy and Duval, JJ.*) MOZHARUL ISLAM *v.* ABDUL GANI ALA. **80 I.C. 914=A.I.R. 1925 Cal. 322.**

—S. 2—Divorce Suits.—

———*Suits for divorce-age of majority of Indian Christians is twenty-one.*

Section 2 has the effect of extending the period of minority till the age of twenty-one in the case of Indian Christians in cases of suits for divorce. (*Kennedy, J. C.*) G. E. G. R. *v.* E. M. R. **79 I.C. 535=A.I.R. 1925 Sind 95.**

—S. 3—'Appointed'.

———*Order appointing guardian on furnishing security—Failure to furnish security—There is no appointment within S. 3.*

Where a person is appointed as guardian of the person or property of a minor under the Guardians and Wards Act on condition of his furnishing security, and fails to furnish the security, there is no appointment of a guardian within the meaning of S. 3 of the Majority Act and such minor becomes major when he completes his 18th year. Such a conditional order is invalid under the Act.

Per *Sadasiva Aiyar, J.*—30 M. L. J. 508, Foll.; 40 Mad. 775, Overruled. (*Coutts-Trotter, C. J., Krishnan and Beasley, JJ.*) NATHA VENKATESA PERUMAL, *In the matter of.* **99 I.C. 213=49 Mad. 809=24 M.L.W. 707=A.I.R. 1927 Mad. 36=51 M.L.J. 726 (F.B.).**

—S. 3—Determination of Minority.

———*Guardian once appointed—Age of majority is 21.*

Where once a guardian had been appointed under Act VIII of 1890, however that guardianship may terminate, the minor cannot attain majority until the age of 21, 21 B. 281 ; 29 A. 672 ; (F. B.) 36 C. 768 ; 11 L.W. 596 ; 5 P.L.J. 460. Foll. (*Harrison, J.*) MT. DURGA DEVI *v.* GUR NARAIN. **69 I.C. 401=A.I.R. 1924 Lah. 157.**

———*Guardian once appointed—Age of majority will be 21 although guardianship is cancelled before majority.*

Where once a certificated guardian is appointed of a minor, the minor will attain majority only at the age of 21 years, although the guardianship certificate is cancelled before minor's attaining majority. (*Das and Ross, JJ.*) SHAIKH ABDUL RAHIM *v.* MT. BARIRA. **61 I.C. 807=2 P.L.T. 556=6 P.L.J. 273=A.I.R. 1921 Pat. 166.**

———*Guardian validly appointed—Minority continues till 21 years though guardian ceases to act.*

Where a guardian has once been validly appointed or declared, the minority does not cease till the attainment of 21 years by the ward and it is immaterial whether the guardian dies or is removed or otherwise ceases to act 36 Cal. 768 Foll. (*Dawson Miller, C. J. and Das, J.*) HARIHAR PRASAD SINGH *v.* EDUL SINGH. **1921 P.H.C.C. 100=2 P.L.T. 11=A.I.R. 1921 Pat. 69,**

—S. 3—Minor.

———*Person cannot be major with respect to one and minor with respect to another property.*

Where minor was adopted after 18 but before 21 years of his age and a guardian had been appointed before his 18th age.

Held, that he cannot be minor with respect to the property of his natural father and major with respect to the property inherited by him from his adoptive father. (*Mukerji and Dalal, JJ.*) MT. CHAMBI *v.* TARA CHAND. **82 I.C. 516=46 All. 744=22 A.L.J. 665=5 L.R.A. Civ. 502=A.I.R. 1924 All. 892.**

—S. 3—Scope of.

There is nothing in S. 3 which states that the minor must have separate property before a guardian of it can be appointed. The section is to be construed as it stands and it clearly states that the minority is extended to the completion of twenty-first year when the guardian of property of the minor has been appointed : 25 All. 407 (P.C.), Ref. (*Kemp, J.*)

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (1900)—Set off.

NARSI TOKERSEY & CO. *v.* SACHINDRANATH GAJANAN. **31 Bom. L.R. 1009=A.I.R. 1929 Bom. 475.**

MALABAR COMPENSATION FOK TENANTS' IMPROVEMENTS ACT (Mad. 1 of 1900.) —Set off.

———*Arrears of rent barred by limitation can be set off.*

The landlord is entitled to set-off arrears of rent even though barred by limitation, (1917) M.W.N. 275, Foll. (*Oldfield and Seshagiri Aiyar, JJ.*) PEDDI KAYILAKATH KUNNI *v.* JHAGYIL KUNHAI AMMA. **13 M.L.W. 32=A.I.R. 1921 Mad. 144.**

—S. 1—Scope.

———*Present Act secures to tenants bettercompensation for improvements.*

The present Act (I of 1900) has not by any express provision made the point, *viz.*, whether the Act applies to the case of buildings in towns, in any way clearer, but the object of the present Act would seem to be to secure the tenants better (higher rate of) compensation for improvements in respect of which they would be entitled to compensation under the prior Act or by custom: A. I. R. 1927 Mad. 776 and Mad. Second Appeal No. 1445 of 1889, Ref. (*Anantakrishna Ayyar, J.*) SABJU SAHIB *v.* MALABAR DIST. BOARD. **120 I. C. 561=53 Mad. 54=30 M. L. W. 697= A. I. R. 1930 Mad. 16=57 M. L. J. 673.**

—S. 3—Applicability.

Srinivasa Ayyangar, J.—Malabar Compensation for Tenants' Improvements Act applies only to agricultural holdings and to building sites, but not to sites already occupied by buildings: A. I. R. 1927 Mad. 776, Appl. (*Srinivasa Ayyangar and Reilly, JJ.*) PATHAMMA UMMA *v.* MOHIDEEN. **110 I. C. 752= A. I. R. 1928 Mad. 929.**

———Tenant of a shop in Malabar does not come within the purview of Act I of 1900. (*Jackson, J.*) K. CHATHU KUTTY *v.* KUNHAPPAN. **103 I. C. 677= 50 Mad. 813=26 M. L. W. 84=39 M. L. T. 254= A. I. R. 1927 Mad. 776=53 M. L. J. 224.**

—S. 3—Improvement.

———*Meaning of.*

Where it was found that a certain building did not add to the holding and was unsuitable to it and inconsistent with the purpose for which it was mortgaged, *held*, that the building did not constitute an improvement within the meaning of the Malabar Tenants' Improvements Act. (*Madhavan Nair, J.*) MAMMAD. *v.* VEERARAYAN. **1929 M. W. N. 165.**

———*Mere increase of net income is not itself improvement or proof of improvement.*

The mere increase of the net income is in itself not an improvement or a proof that there has been an improvement, but there must be some evidence of actual improvement as defined by the Act: 28 I. C. 389; Not App.; 35 M. L. J. 219, Foll. (*Odgers and Wallace, JJ.*) AMBI *v.* KUNHI KANAMMA. **118 I.C. 296= A. I. R. 1929 Mad. 661.**

—S. 3—Interpretation.

———*"Cultivation" and "cultivate" are limited to waste lands.*

The natural construction of S. 3 (1) is to limit the words "cultivation" and "cuitivate" to the case of "waste lands" mentioned in the last portion of the subsection. (*Ananta Krishna Ayyar, J.*) SABJU SAHIB *v.* MALABAR DISTICT BOARD. **120 I. C. 561= 53 Mad. 54=30 M. L. W. 697= A. I. R. 1930 Mad. 16=57 M. L. J. 673.**

—S. 4—Compensation.

———*Planting cocoanut trees in place of paddy.*

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT, (1900), S. 5—Ejectment.

The land at the time when it was leased out was not fit for paddy cultivation and without raising the present levels the tenants substituted cocoanuts for paddy as the lie of the land was better fitted for cocoanuts than for paddy.

Held: that the planting of such cocoanuts would then be an improvement, the value of which the tenants are entitled to recover. (*Wallace, J.*) (PUTHALATH) CHATTI SOOPI *v.* (CHAMBATAM) VEETIL KANNAN NAYAR. **1929 M.W.N. 873= A.I.R. 1930 Mad, 418.**

—S. 4—'Fruit trees'.

———*Palmyras are not fruit trees and should be compensated for under S. 10.*

Palmyra trees in Malabar are generally not fruit trees within the meaning of S. 4 (b) and may be compensated for as timber trees or other useful trees under S. 10: A.I.R. 1927 Mad. 137, Rel. on. (*Odgers, and Wallace, JJ.*) AMBI *v.* KUNNIKAVAMMA. **118 I.C. 296=A.I.R. 1929 Mad. 661.**

—S. 4—Improvements—Onus.

———*One-crop land converted into two-crop land— —Landlord must prove if he contends that it was not due to tenants' exertion.*

Under the Act the landlord is bound to compensate the tenant on ejectment for the improvements effected by the tenant and the effect of S. 4 clearly is to throw upon the landlord, when once it is shown that one-crop land has been converted into two-crop land, the burden of proving that this was not due to anything done or spent by the tenant: 35 M,L.J. 219, *Doubted*. (*Coutts-Trotter, C. J. and Wallace, J.*) KRISHNA MENON *v.* M. UNNI MAMU. **90 I.C. 999= 22 M.L.W. 186=A.I.R. 1925 Mad. 1222= 49 M.L.J. 99.**

—S. 5—Costs of Improvements.

A paying cost of improvements to tenant and taking possession—B subsequently desiring to take possession must pay cost of improvement to A. (*Curgenven, J.*) MAYANKUTTI *v.* BIYYATHUMMA. **104 I.C. 420= 26 M.L.W. 161=39 M.L.T. 92= 1927.M.W.N. 790=A.I.R. 1927 Mad. 824= 53 M.L.J. 512.**

—S 5—Determination of tenancy.

Section 5 (2) though it provides that a tenant continuing in possession after the expiry of his lease until the payment for improvements is made shall hold " as tenant subject to the terms of his lease " has not the effect of preventing the determination of the tenancy for other purposes by expiry of the term (*Reilly, J.*) PAIDAL NAIR *v.* VANIYANKELU. **115 I.C. 349=A.I.R. 1928 Mad. 1237.**

—S. 5—Ejectment.

———*Payment of compensation is condition precedent to ejectment.*

The Appellant was a sub-lessee in Malabar holding under a kanamdar. Respondent 1 had sued to redeem the kanam and obtained a decree. A dispute having arisen between the appellant and the Kanamdar as to who was entitled to the compensation for the improvements the Court ordered that the amount in dispute be kept in Court deposit to be paid out to whoever establishes his title. The deposit was accordingly made- The appellant contended that under Madras Act I of 1900 he could not be ejected from possession until the compensation for his improvements had been ascertained and paid to his credit. The respondent contended that so long as he has deposited the value of the improvements into Court, he has conformed to the Act, and the appellant may be left to fight out his

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (1900), S. 6—Ejectment.

claim for compensation with the kanomdar after ejectment.

Held : that the appellant cannot be ejected till his claim for compensation has been adjudicated upon and the compensation amount found due to him has been paid into Court to his credit : A.I.R. 1922 Mad. 347, Expl. and Dist.; 24 Mad. 47 (F.B.) Rel. on.; A.I.R. 1921 Mad. 609, Expl. (*Jackson, J.*) CHANDU KUTTI *v.* MAHADEVI. **110 I.C. 738=28 M.L.W. 704=A.I.R. 1928 Mad. 534=55 M.L.J. 450.**

———*Ejectment is legal before compensation is paid—No stay of execution is necessary pending revaluation.*

S. 5 or 6 does not make the payment of the compensation a condition precedent to ejectment. 29 I. C. 559, doubted.

Even where an application under S. 6 for further valuation of new improvements of portions of lands after the decree is pending, there would be no objection to the execution of the decree of ejectment as to the whole of the lands. (*Spencer and Ramesam, JJ.*) MANAKAL MURTHI SANKARAN *v.* AREEKARA AZHAKTH SANKARAN NAIR. **66 I. C. 129=44 Mad. 960=1921 M. W. N. 470=A. I. R. 1922 Mad. 347.**

—S. 5—Interpretation.

———*Meaning of.*

The expression "predecessor-in-interest" has to be used not in a strict sense but as meaning a person who claims title from any other by assignment, transfer, gift, etc.; and in claiming compensation where one kanomdar redeemed the other, the latter should be treated for the purpose of S. 5 as the predecessor-in-interest of the former : 28 M. L. J. 184 and 17 I. C. 433, Rel. on. (*Kumaraswami Sastri and Walsh, JJ.*) KUNJUNNI NAIR *v.* RAMAN MENON. **31 M. L. W. 210=1930 M. W. N. 106=A. I. R. 1930 Mad. 502.**

—S. 5—Jurisdiction.

———*Suit to restrain tenant from making changes in property—Section does not bar Civil Court's jurisdiction to entertain.*

There is nothing in Section 5 of the Malabar Compensation for Tenants Improvements Act which ousts jurisdiction of a Civil Court in a suit between the landlord and tenant to grant a temporary injunction restraining the tenant from making changes in the property. (*Kumaraswami Sastri, J.*) KADAN KULATHIL SAIDALI KUTTI *v.* CHARAVOOR METHAMKOTH MANAKKAL GODAN NAMBUDRI. **70 I.C. 713=1922 M. W. N. 303=16 M. L. W. 238=A. I. R. 1922 Mad. 172.**

—S. 5—Kanomdar.

———*Right to remain in possession—Limits.*

The plaintiff obtained a decree for redemption of the kanom properties against the defendant and in execution of that decree, obtained possession of the properties after paying to the defendant the value of the improvements as settled by the Court of trial. The defendant appealed against the decree with reference to the amount awarded for improvements, but he did not take any objection to the decree as to the right of the plaintiff to redeem. The appellate Court enhanced the amount payable on account of improvements, and to that extent, modified the decree of the Lower Court.

Held, that under S. 5 of the Malabar Compensation for Tenants Improvements Act, the defendant was not entitled to remain in possession after the decree for redemption and so was not entitled to mesne profits on the ground that under the Malabar Law the Kanomdar is entitled to remain in possession until compensation for improvements is paid to him. (*Abdur Rahim and Odgers, JJ.*) MANIAN *v.* K. RAMAN. **62 I. C. 724=13 M. L. W. 449=A. I. R. 1921 Mad. 609=41 M. L. J. 15.**

MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (1900), S. 10—Improvement.

—S. 6—Compensation.

———*Commissioner has to consider compensation for improvements subsequent to decree awarding compensation—Onus lies on kanomdar to supply material for determination.*

Under S. 6 (3) the Commissioner has to consider if any and what compensation is to be given for new improvements subsequent to the date up to which compensation for improvements has been adjudged in the decree, and whether any improvement, which has already been adjudged, has to be re-valued in consequence of some change in its condition since the adjudication of it in the first case. It is not his business to make a valuation *de novo*. The starting point of the second valuation is the point where the first left off, and on the kanomdar rests the onus of putting before the Commissioner evidence on which he has to make his decision. (*Wallace, J.*) GODAN NAMBUDRIPAD *v* KRISHNAN. **94 I. C. 913=1926 M. W. N. 326=23 M. L. W. 754=A. I. R. 1926 Mad. 680.**

—S. 6—Court-fee.

———*Damages, unlike improvements, affect Court-fee.*

The principle that improvements would not affect the Court-fee cannot be extended to damages. Such extension cannot be said to be intended by the phrase "or otherwise" in S. 6 (2), Madras Act (I of 1900). (*Jackson, J.*) GOVINDAN NAIR *v.* ITHALUTY. **94 I.C. 557=A.I.R. 1926 Mad. 542=50 M.L.J. 213.**

—S. 6—Interpretation.

———*Words "or otherwise in respect of the tenancy" include damages.*

The words "any sum of money accruing due for rent or otherwise in respect of the tenancy" are wide enough to include damages. Therefore when plaintiff sues for redemption of Kanom and also prays for a deduction of certain amount claimed as damages, he is entitled to pay the Court-fee after the amount recoverable, by way of damages, has been ascertained and set off against the amount payable by way of improvements. A. I. R. 1926 Mad. 542 Reversed. (*Jackson, J.*) GOVINDAN NAIR *v.* ITHALUTY. **1926 M.W.N. 442=A.I.R. 1926 Mad. 764=50 M.L.J, 493.**

—S. 10—"Improvement."

Section 10 is governed by S. 3 and the word "improvement" in that section means the same thing as definition of "improvement" in S. 3 (3): 32 M.L J. 541, Expl. (*Phillips and Odgers, J.*) PARAMESWARA NAMBUDRIPAD *v.* SRIDHARAN NAMBIAR. **115 I. C. 57=1928 M.W.N. 670=A.I.R. 1929 Mad. 289.**

———*Useful trees and plants spontaneously grown but protected by tenant and adding to holdings' value are "improvement."*

Timber trees or other useful trees or plants spontaneously grown during the period of tenancy, are improvements if they are protected or maintained by the tenant and add to the value of the holding and are suitable to it and consistent with the purpose. The mere fact that they have grown up into trees is some presumption that they have been protected by the tenant : 28 M.L.J. 184, Dist.; 32 M.L.J. 541, Expl.

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (1900), S. 15—Compensation.

(*Phillips and Odgers, JJ.*) PARAMESWARA NAMBUDRIPAD v. SRIDHARAN NAMBIAR. **115 I.C. 57 = 1928 M.W.N. 670 = A.I.R. 1929 Mad. 289.**

—S. 15—Compensation.

———*Table of prices—Connotation of.*

The lower Court passed its decree in 1923 taking into account Local Government table of prices published in 1918 although there was another table published before the date of the decree. On appeal against the decree the High Court remanded the case directing that the table of the nearest date to the date of decree should be adopted. The lower Court, however, amended its decree by taking into account a table subsequent to the date of the decree itself.

Held: that the lower Court went wrong in taking into account a table subsequent to the date of the decree: 35 M.L.J. 219; 17 I.C. 131, Dist. (*Odgers and Wallace, JJ.*) AMBI v. KUNHIKAVAMMA. **118 I.C. 296 = A.I.R. 1929 Mad. 661.**

—S. 19—Compensation.

———*Agreement to wait till end of tenancy without cutting trees—Breach—Tenant is not entitled to compensation.*

Where the act of felling down the trees is an act of improvement, the imposition of a small Kuhzi Kanam fees does not, but the imposition of fee equal to the full value of the tree, does contravene S. 19. But where the felling down the trees is not an improvement, the question does not arise. If the trees are in existence at the end of the tenancy, the tenant is entitled to compensation, but not otherwise, and if he chooses to enjoy the benefit of the tree by cutting it down during the tenancy, no question of compensation arises and consequently it is difficult to see how an agreement to pay some fee (small or large) for each tree cut can limit the right of tenant to make improvements and to claim compensation for them within the meaning of S. 19 of the Act. Where the agreement amounted to an undertaking to wait till the end of the tenancy when the tenant could get his compensation.

Held: a breach of the undertaking deprives the landlord of his right to have the full grown trees at the end of the tenancy by paying their value to the tenant. (*Ramesam, J.*) KELU NAIR v. VIYATHAN MAHADEVI. **69 I.C. 545 = 16 M.L.W. 310 = 1922 M.W.N. 563 = 31 M.L.T. 309 = A.I.R. 1923 Mad. 238.**

—S. 19—Proviso.

———*Settling the amount of. Compensation.*

"Settling the amount of compensation" in S. 19 (Proviso) does not include settling the rate of compensation to be paid for existing improvements at some future date, if they survive. And parties who before 1st January 1886 had made a contract regarding the rates of compensation to be paid, are bound by that contract, even after that date: 40 Mad. 594, Foll.; S. A. 215 of 1924, Not Appr. (*Reilly, J.*) PAIDAL NAIR v. VANIYANKELU. **115 I.C. 349 = A.I.R. 1928 Mad. 1237.**

MALABAR LAW.

Aliyasanthana.
Anandravan.
Custom of impartibility.
Debts.
Devaswom.
Gift.
Kanom.
Karnavan.
Landlord and tenant.
Land tenure.
Maintenance.
Makkathayam.
Marumakkathayam.
Mortgage.
Nambudris.
Stanom.
Tarwad.
Tavazhi.
Miscellaneous.

—Aliyasanthana.

———*Succession—Community of Pollution—Test of heirship.*

Under Aliyasanthana Law it cannot be held that a divided family, however long it may be since the division took place, necessarily succeeds. There must at least be community of pollution in order to constitute heirship. (*Phillips and Ramesam, JJ.*) SECY. OF STATE v. DUGAPPA BHANDARY. **95 I.C. 789 = A.I.R. 1926 Mad. 921.**

———*Reversioner's rights.*

When a reversionary heir succeeds to the right of a person entitled to question an alienation, the reversioner himself would *prima facie* have that right: 44 Mad. 140, Dist. (*Phillips and Ramesam, JJ.*) SECY. OF STATE v. DUGAPPA BHANDARY. **95 I.C. 789 = A.I.R. 1926 Mad. 921.**

———*Family arrangement.*

Arrangement not to provide security for the member's separate debts, but to facilitate the separate enjoyment, which the members entered on as convenient is legal, where all the adult members were parties in it. (*Oldfield and Hughes, JJ.*) KUNHANNA RAI v. MANKU CHETTY. **63 I.C. 365 = 30 M.L.T. 25 = A.I.R. 1921 Mad. 669.**

———*Junior member.—Right to manage.*

Where the *de jure* Ejman had practically abandoned his position, it is not essential that he should have done so in any formal manner in order to justify the management by his juniors. (*Oldfield and Hughes, JJ.*) KUNHANNA RAI v. MANKU CHETTY. **63 I.C. 365 = 30 M.L.T. 25 = A.I.R. 1921 Mad. 669.**

———*Marriage expenses—Defrayal by the Karnavan.*

The marriage expenses of a junior member of a tarwad or Aliyasanthana family should be defrayed by the karnavan or ejman, provided that the family has adequate funds; and the karnavan or ejman has no valid and proper objections to the marriage (*Case-law reviewed.*) (*Odgers and Madhavan Nair, JJ.*) SHESHAPPA SHETTY v. DEVARAJA SHETTY. **95 I.C. 401 = 49 Mad. 407 = 1926 M.W.N. 413 = 24 M.L.W. 269 = A.I.R. 1926 Mad. 723 = 50 M.L.J. 434.**

———*Separate maintenance—Conditions.*

The right of a member of an *Aliyasanthana* family to maintenance in the *tarwad* house is undoubted and under certain circumstances he is entitled to separate maintenance outside; but the right to separate maintenance cannot be put on the mere ground that there is no such complete harmony in the house as to ensure the happiness of the claimant. Mere inconvenience is not sufficient to warrant separate maintenance. There is also no right to claim maintenance charges for a period when some members resided away for a portion of the year with their husbands or wives. (*Phillips, J.*) CHANDAYA HEDGE v. KAVERI HEGADTHI. **92 I.C. 390 = A.I.R. 1926 Mad. 189 = 49 M.L.J. 727.**

—Anandravan.

———*Right to sue on behalf of Tarwad.*

Unless the *karnavan* himself is disabled from suing to obtain other relief regarding the *tarwad* property

MALABAR LAW—Custom of impartibility.

an *anandravan* cannot be allowed to sue on behalf of the *tarwad* for the relief claimable by the *tarwad* in respect of the *tarwad* property. (20 Mad. 129; 43 Mad. 393; 32 M. L. J. 323 and 29 M. L. J. 632 Foll. and 14 Mad. 101 Expl. and Dist. (*Phillips, J.*) V. K. PACKI *v.* V. K. MUHAMMAD. **91 I.C. 638= A.I.R. 1926 Mad. 150=49 M.L.J. 513.**

—Custom of impartibility.

No custom of impartibility exists among Thiyyas families : 17 Mad. 184 Expl. *(Waller and Madhavan Nair, JJ.)* PATTUKKAYAL CHAKUTTI *v.* KOTHEBRA CHANDUKUTTI. **105 I.C. 55=39 M.L.T. 314= A.I.R. 1927 Mad. 877=53 M.L.J. 368.**

—Debts.

——*Karnavan—Binding nature.*

Where by the terms of the karar, a karnavan has specifically divested himself of the power to incur debts he has no power to bind the tarwad by raising loans subsequently. (*Pakenham Walsh, J.*) MAVILI ERECHAN MENOKI *v.* KOMAPAN NAIR. **125 I.C. 65.**

—Devaswom.

——*Suit by one—When proper.*

Per *Ramesam, J.*—Where the other Uralan is a party to the suit the principle that a suit by one of two Uralans to recover Devaswom property from a lessee without consulting the other is liable to be dismissed, does not apply. 34 Mad. 406; 26 Mad. 461 and 24 M. 296 Dist.

Per *Wallace, J.*—The remedial right of the Uralans as trustees does not accrue to the trustees until they as a body after consultation signify their will to determine the lease and communicate that will to the lessee. (*Ramesam and Wallace, JJ.*) KANNAN KUTTY *v.* ELAYA VEETIL VELU. **80 I.C. 139= 19 M.L.W 115=1924 M.W.N. 151= A.I.R. 1924 Mad. 771=46 M.L.J. 122.**

——*Renewal of kanom by one.*

A renewal of a kanom by one of several Uralars without consulting the other Urlars is not binding on the Devaswom. (*Spencer and Krishnan, JJ.*) SANKARAN NAMBI *v.* DEVAKI. **73 I.C. 491=16 M.L.W. 26= 1922 M.W.N. 428=A.I.R. 1922 Mad. 259= 43 M.L.J. 572.**

——*Minor's Rights.*

—A minor can be an Uralar of a Devaswom and a suit by the next friend of the minor Uralar on behalf of the Devaswom is not bad. (*Spencer and Krishnan, JJ.*) SANKARAN NAMBI *v.* DEVAKI. **73 I.C. 491= 16 M.L.W. 26=1922 M.W.N. 428= A.I.R. 1922 Mad. 259=43 M.L.J. 572.**

——The continuance in caste of a person chosen as an Uralan of a devaswom because he is a Nambudri is essential for his continuing as Uralan. (*Krishnan, J.*) HARIHARA IYER *v.* UKKANDAN VARIAR. **81 I.C. 498=A.I.R. 1925 Mad. 207.**

——*Right to be consulted.*

The general rule, that *Uralars* (temple trustees) in a Malabar *Devaswom* are entitled to be consulted before any act—such as the granting of a lease or *Melcharth*—is done in the management of the trust property, is well established. There can be no exception to it even when the omission to consult a *Uralar* is attributable to his possession of an interest which would disqualify him from giving an independent opinion. 34 Mad. 406 and *Wilkinson* v. *Malin* (2 Beav. 104), followed. *Attorney-General* v. *Shearman*, (2 C. and J. 636) distinguished. (*Oldfield and Ramesam, JJ.*) MATUMULLA MANIKOTH PATTAM CHANDER *v.* KUTTIYIL RAYIRU. **66 I.C. 396= 15 M.L.W. 264=1922 M.W.N. 172=32 M.L.T. 25= A.I.R. 1922 Mad. 2=42 M.L.J. 280.**

—Gift.

——*Gift by father—Estate taken.*

MALABAR LAW—Kanom.

A father who is governed by the Malabar law is entitled to make a gift of his property to anybody. If his intention is to give it to any one absolutely nobody is entitled to claim the property for the benefit of the family, but where the intention as gathered from the conduct of the parties as well as from the circumstances, was to benefit the family, it cannot be said that because the property was purchased in the names of only one or two children, that property ought to be considered as the separate property of such child or children : 31 I.C. 854 and 25 M.L.J. 637, Foll. (*Devadoss, J.*) MOMMAD KUTTI *v.* RAMUNNI NAIR. **109 I.C. 245= A.I.R. 1928 Mad. 962.**

——*Gift by husband—Estate taken.*

Where a person makes a gift to or buys property in the name of his wife, when there are children by the wife, there is no presumption that the property given to her or acquired in her name should be for the benefit of herself and her children and that she should not have an absolute interest. (*Devadoss, J.*) KALIANI AMMA *v.* KARTHIYANI AMMA. **99 I.C. 589= 38 M.L.T. 103=A.I.R. 1927 Mad. 299. 52 M.L.J. 17.**

——*Gift of Tarwad property.*

A gift of tarwad property executed by the *karnavan* and other members of the tarwad is not void *ab initio* and where the adult members of the tarwad have not sued to set aside the gift within limitation, a suit to set it aside cannot afterwards be maintained. (*Wallace, J.*) K. JANAKI *v.* P. GOVINDAN. **85 I.C. 546=22 M.L.W. 113= A.I.R. 1925 Mad. 990.**

——*Family—Property—When valid.*

The karnavan and the junior members all together might make a gift of the entire family property if they so choose and if the karnavan makes such a gift and the other members of the family affirm it the result would be the same. There is no provision of law which lays down that they must affirm it by some positive act of theirs. (*Abdur Rahim and Oldfield, JJ.*) THAYYIL MAMMAD *v.* P. MAMMAD. **60 I.C. 118= 44 Mad. 140=A.I.R. 1921 Mad. 376.**

—Kanom.

——*Kanomdar and Mortgagee from—Respective rights.*

The Kanomdar has no right to sell the jenmi property. His only right is to remain in possession until he is repaid the kanom amount plus the value of improvements. A mortgage of that interest takes his mortgage subject to the liability of the Kanomdar to be redeemed at the end of 12 years. As regards the right to have an account of the cost of improvements, the tenant's right is analogous to the right to a chose in action and the landlord is not affected by a transfer of it unless he has notice of it : 23 Mad. 86 Ref. There is no privity between the jenmi and mortgagee of the kanomdar's interest who is not in possession of the estate. Jenmi is not liable to pay the mortgagee of kanom interest his mortgage amount because jenmi, failed in the redemption suit to make him a party, if he never had any notice of the sub-mortgage. (*Spencer, J.*) VISWANATHA IYER *v.* CHIMUKUTI AMMA. **95 I. C. 3=1926 M.W.N. 249= 23 M.L.W. 761=A.I. R. 1926 Mad. 650.**

——There is nothing in books on Malabar Law to show that the tenure 'Neerozbikka Otti Kanom' is irredeemable. (*Krishnan and Ramesam, JJ.*) PYRU NAMBIA *v.* KAPPALLI KANARA KURUP. **70 I.C. 20= 1923 M.W.N. 76=16 M.L.W. 930= A.I.R. 1922 Mad. 185=42 M.L.J. 350.**

MALABAR LAW—Kanom.

———*Kanomdar—Right to remain in possession—Limits.*

The plaintiff obtained a decree for redemption of the *kanom* properties against the defendant and in execution of that decree, obtained possession of the properties after paying to the defendant the value of the improvements as settled by the Court of trial. The defendant appealed against the decree with reference to the amount awarded for improvements: but he did not take any objection to the decree as to the right of the plaintiff to redeem. The Appellate Court enhanced the amount payable on account of improvements, and to that extent, modified the decree of the Lower Court.

Held,, that under S. 5 of the Malabar Compensation for Tenants Improvements Acts the defendant was not entitled to remain in possession after the decree for redemption and so was not entitled to mesne profits on the ground that under the Malabar Law the *Kanomdar* is entitled to remain in possession until compensation for improvements is paid to him. (*Abdur Rahim and Odgers, JJ.*) MANIAN *v.* K. K. RAMAN. **62 I.C. 724=13 M.L.W. 443= A.I.R. 1921 Mad. 609=41 M.L.J. 15.**

—Kanom—Melcharth.

The mere non-payment of a manusam or sanjanyam promised cannot invalidate a melcharth otherwise valid. (*Sadasiva Aiyar and Spencer, JJ.*) KRISHNA MENON *v.* KRISHNA NAIR. **62 I.C. 598= 13 M.L.W. 584=A.I.R. 1921 Mad. 520= 40 M.L.J. 338.**

—A prior kanomdar has no right to question a melcharth if the term of his kanom has already expired. (*Sadasiva Aiyar and Spencer, JJ.*) KRISHNA MENON *v.* KRISHNA NAIR. **62 I.C. 598= 13 M.L.W. 584=A.I.R. 1921 Mad. 520= 40 M.L.J. 338.**

—Kanom—Nature.

A kanom is an anomalous mortgage being a combination of a usufructuary mortgage and a lease for 12 years. (*Spencer, J.*) VISWANATHA IYER *v.* CHIMUKUTI AMMA. **95 I.C. 3= 1926 M.W.N. 249=23 M.L.W. 761= A.I.R. 1926 Mad. 650.**

—A Kanom partakes of the nature of a usufructuary mortgage and a lease and that is an anomalous mortgage falling under Section 98 of the Transfer of Property Act. It is not either convenient or even practicable to embark in each case on an enquiry as to whether the amount advanced is so insignificant having regard to the necessities and position of the grantor of the Kanom that the transaction should be viewed only as a lease and not a mortgage.

Where the document on the face of its recitals purports to evidence a Kanom demise, it is an anomalous mortgage with certain well known incidents attached to it by the customary law of Malabar. 27 Mad. 373 Dissented from. 30 Mad. 300, Rel. on. (*Sadasiva Aiyar and Napier, JJ.*) K.P.V.P. KANNA KURUP *v.* THAMASIKUM VARMA RAJU. **62 I.C. 386=44 Mad. 344=14 M.L.W. 69= 1921 M.W.N. 229=A.I.R. 1921 Mad. 243= 40 M.L.J. 282.**

—Kanom—Redemption.

———*Mortgagor's Right to set off.*

In a suit for redemption of kanom, a sum due to the mortgagor for arrears of rent from the mortgagee can be set off against the kanom amount and the mortgagor does not lose this right of set off by obtaining a personal decree against the Kanomdar for rent due to him: 41 Mad. 1043, Rel. on. (*Devadoss, J.*) CHIRAPATH THAMASIKKUM KOLATHAYI KUNHI

MALABAR LAW — Karnavan — Alienation — Powers.

KRISHNAN NAMBIAR *v.* PUTHIYOTTIL KUNHI PENNU. **98 I. C. 563=38 M.L,T. 139= A.I.R. 1927 Mad. 189.**

———*Stay of delivery.*

Kanomdar is not entitled to have delivery stayed pending a revaluation of improvements. 44 Mad. 960, Foll. (*Spencer and Devadoss, JJ.*) SUBRAMANIAN PATTAR *v.* P.K.V. SRIDEVI. **75 I.C. 566= 18 M.L.W. 686=33 M.L.T. 101=1923 M.W.N. 753= A.I.R. 1924 Mad. 102=45 M.L.J. 687.**

———*Collusion between karnavan and kanomdar.*

Where an Anandravan of a Tarwad sued for redemption of a kanom, executed by the karnavan, for consideration, no part of which was binding on the tarwad, and where the kanom-holder had succeeded to the interest of the kanomdar under the earlier binding kanom,

Held, that these facts would be sufficient to justify an inference of collusion between the karnavan and the kanomdar and to justify the grant of redemption decree in favour of plaintiff tarwad, as the continuance of the kanom would be prejudicial to the tarwad interest. (*Ayling and Odgers, JJ.*) AMINA UMMA *v.* RAYARAPPAN NAMBIAR. **74 I. C. 1026= 1923 M.W.N. 518=A.I.R. 1923 Mad. 706.**

—Karnavan—Acquisition.

———*Presumption.*

Where there is no evidence to the contrary an initial presumption obtains that property which the *karnavan* of a *tavazhi* has acquired has been acquired for the *tavazhi* and with the aid of the *tavazhi* fund. This presumption must hold good unless and until the person who states that the property is the *karnavan's* self-acquired property proves the fact by evidence. (*Krishnan, J.*) CHATHU NAMBIAR *v.* SEKKARAN NAMBIAR. **85 I.C. 1050= 1925 M.W.N. 61=A.I.R. 1925 Mad. 430= 47 M.L.J. 695.**

—Karnavan—Acts of.

———*Binding nature.*

On dissolution of a partnership the Karnavan of a Thavazh accepted a smaller portion of the assets of the partnership than he was entitled to, under the terms of the partnership, from the partners who were strangers to the thavazh. On a suit by the junior members to set aside this arrangement,

Held, that though the junior members were bound by agreements made by the karnavan during the continuance of the business of the partnership still after the dissolution they were not so bound. (*Spencer and Devadoss, JJ.*) O. T. SOOPI *v.* K. P. C. ABDULLA. **82 I.C. 198=20 M.L.W. 390= 1924 M.W.N. 782=A.I.R. 1924 Mad. 909= 47 M. L. J. 554.**

—Karnavan—Alienation.

———*Challenging by Attaladakkam heir.*

An attaladakkam heir succeeds to the properties of a tavazhi only when there are no members of the tavazhi left and of course only to properties which were not disposed of by the last members of the tavazhi and therefore he is not entitled to challenge an alienation by karnavan which is not challenged by the other members in their lifetime. (*Abdur Rahim and Oldfield, JJ.*) THAYYIL MAMMAD *v.* P. MAMMAD. **60 I.C. 118=44 Mad. 140= A.I.R. 1921 Mad. 376.**

—Karnavan—Alienation—Powers.

———*Kanom.*

In the case of an ordinary family, which has considerable properties, if the karnavan demise some property on kanom, his act cannot be questioned by the

MALABAR LAW — Karnavan —Alienation — Powers.

junior members of the family ; but where the family property consists of very few items, which items are actually in the possession of the members of the family and out of the income of which they are maintaining themselves, it is not a prudent act, on the part of the karnavan, to dispossess them of the lands by giving the kanom to a stranger, especially where the karnavan is not living with the family, but is living away from the family and he is not in possession of property, with which he could maintain the other members. (*Devadoss, J.*) K. CHAMBER *v.* PAZHANI. **90 I.C. 980=21 M.L.W. 78= A.I.R. 1925 Mad. 745.**

———*Renewal of kanom prior to expiry of period—Karnavan has power to grant Kanom without necessity—Renewal of Kanom is justified if for benefit of state.*

A renewal of a kanom by a karnavan before the expiry of its period, when such renewal is to take effect from the date of expiry, is not valid, unless it is shown to be for necessity. A karnavan's position is somewhat higher than that of a Hindu widow and in fact, he has, in some respects, greater powers than a manager of a joint Hindu family. 3 Mad. 169, Ref. He has full powers of management of the family property and is even allowed to give kanoms of the tarwad property without necessity although the kanom amounts to an alienation of immoveable property. The chief reason for holding that necessity must be proved in order to validate a renewal executed before the expiry of the subsisting kanom is that it is impossible to predicate some years in advance what the state of affairs will be when the original kanom *expires*, and what incidents should be imposed in order to make the demise beneficial. But where a particular demise is to take effect at once the above consideration does not come into play. If therefore a karnavan can obtain the consent of kanomdar to a premature renewal to take effect from that date, it does not necessarily follow that it is an act of bad management, even if necessity be not proved. Where the litigation is avoided by the compromise, the transaction must be recorded as having been entered into *bona fide* and for the benefit of the estate. It is not necessary for a contracting party to prove that the estate did, in fact actually benefit. (*Phillips and Devadoss, JJ.*) KENATHA ACHAN *v.* KALLIANI AMMA. **75 I.C. 476=18 M.L.W. 203= 1923 M.W.N. 807=A.I.R. 1923 Mad. 700= 45 M.L.J. 258.**

———*Moveables.*

The Karnavan of the tarwad is by his office invested with the management of the moveable property of the tarwad. 39 M. L. J. 590, Foll. (*Spencer and Ramesam, JJ.*) KRISHNAN *v.* MT. GOVINDAN. **69 I. C. 302=14 M. L. W. 539= 1921 M. W. N. 715=A.I.R. 1921 Mad. 677= 41 M. L. J. 381.**

—A karnavan has absolute power to sell and convert into money all moveable tarward property including decrees and debts. The alienee need not see to the application of the money nor need he enquire as to the existence of necessity. (Per *Sadasiva Aiyar, J.*) (*Sadasiva Aiyar and Spencer, JJ.*) SUBRAMANIA PATTAR *v.* KRISHNA EMBRANDRI. **60 I. C. 77= 12 M. L. W. 361=39 M. L. J. 590.**

—Karnavan—Debts.

———*If a charge.*

A loan borrowed in excess of the powers of the karnavan as determined by a family karar cannot be a charge on the Tarwad property: 35 Travancore. L. R 110, Appr. ; 22 Mad. 289, Dist. (*Phillips and Ramesam, JJ.*) RAMA VADHYAR *v.* KRISHNAN NAIR. **93 I. C. 20=23 M. L. W. 186= A. I. R. 1926 Mad. 398.**

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—Karnavan—Decree against.

———*Tarwad when bound.*

A decree against the karnavan binds the tarwad if he was sued in his representative capacity and the decision of the latter question is not so much a question whether he was specifically impleaded as representative of the tarwad, as whether he was as a matter of fact not conducting the litigation for the tarwad; and if it is found that he was, it does not matter if the other members were added or omitted to be added : 53 I. C. 548 and A. I. R. 1923 All. 211, not Appr. ; 27 Mad. 375 and 35 M. L. J. 51, Foll. (*Wallace, J.*) VESU *v.* KANNAMMA. **97 I. C. 551= 1926 M. W. N. 763=A. I. R. 1926 Mad. 991= 51 M. L. J. 282.**

———*Binding nature—Onus.*

When the *karnavan* of a *tarwad* or *tavazhi* has been impleaded in that capacity by a mortgagee or other alienee, a decision against him and the *tavazhi* property does not necessarily bind the other members, unless and until they show that the litigation was not honestly conducted on their behalf. The burden of proof depends on the circumstances and not on any presumption invariably arising out of Malabar institutions. (*Oldfield and Ramesam, JJ.*) SUBRAMANIAN PATTAR *v.* K. U. RAMAN. **69 I.C. 363= 16 M. L. W. 620=31 M. L. T. 454= A. I. R. 1922 Mad. 519=44 M. L. J. 596.**

—The decision against a karnavan when he has litigated in good faith is binding on the tarwad. (1914) M.W.N. 689, Dist. (*Sadasiva Aiyar and Spencer, JJ.*) K. KRISHNA MENON *v.* K. KRISHNAN NAIR. **62 I.C. 598=13 M.L.W. 584= A.I.R. 1921 Mad. 520=40 M.L.J. 338.**

—Karnavan—Delegation of management.

A karnavan can surrender his powers of management. (*Walsh, J.*) (MAVILI) EROCHAN MENOKI *v.* PUNNASSERI ELEVANA TARWAD KARNAVAN. **A.I.R. 1930 Mad. 821.**

The karnavan of a tarwad executed a document in the first part of which he renounced his powers of management of the tarwad and in the second part delegated them to two of the junior anandravans for the consideration of Rs. 500 and future maintenance, and the document recited that the said anandravans were to act "as the representatives of myself, the karnavan."

Held : that the document could not be divided into two parts but must be regarded as one document either of renouncement of powers or of delegation of them. If former it was invalid because it did not amount to an out-and-out unconditional renunciation recognizing the senior anandravan's rights of succession. If latter it was invalid because a karnavan has no right to delegate his powers : 28 Mad. 182 (F.B.), Dist. ; 12 Mad. 219, Rel. on. (*Phillips and Odgers, JJ.*) RAMANKUTTY MENON *v.* BEEVI UMMA. **115 I.C. 55= 1928 M.W.N. 713=A.I.R. 1929 Mad. 266.**

—Karnavan—Karar—Construction.

Karnavan executed a karar in favour of anandravan as follows : Contracting of debts for accidental or extraordinary purposes was to be with consent of both of them. When the former could not participate, the latter could raise it independently of the former. Karnavan was not to interfere in the tarwad affairs without participating with anandravan so long as power of attorney was in force, *Held* that accord-

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ing to the karar, he had no power to raise loan, without anandravan, while latter alone could do so: A.I.R. 1921 Mad. 520, Expl. (*Walsh, J.*) (MAVILI) EROCHAN MENOKI *v.* PUNNASSERI ELEVANA TARWAD KARNAVAN. **A.I.R. 1930 Mad. 821.**

—Karnavan—Negligence.

———*What is.*

Where Appellate Court grants relief which nobody has asked and of which the karnavan of a tarwad has no notice, no gross negligence can be attributed to the Karnavan, even if he did not contest the appeal. A.I.R. 1925 Mad. 792 and 7 Mad. 413, Dist. (*Wallace, J.*) THIRUVENGADAM MAMMAD *v.* CHATHAMKARA AMMAL. **114 I.C. 230=A.I.R. 1929 Mad. 89.**

—Karnavan—Position of.

———*Trust vested in Tarwad.*

Where a trust is vested in the tarwad, the real trustee is the karnavan since the members of the tarwad have no personal right to interfere in his management. They have merely the right to succeed to the trusteeship if and when they succeed to the karnavanship, and his office and duties cannot be the subject of transfer or devolution. (*Wallace and Thiruvenkatachariar, JJ.*) KELU ACHAN *v.* SIVARAMA PATTAR. **113 I.C. 635=A.I.R. 1928 Mad. 879.**

———*Management—Accounting.*

The karnavan is the manager of the family estate. He may administer that estate for the benefit of the family according to his own discretion. He is not bound to render any account or to pay to the tarwad any surplus he may have in his hands, which of course does not mean that he may devote the surplus to other than tarwad purposes, but only that he need not distribute it among the individual members, if in his discretion he prefer to accumulate or invest it for the benefit of the family as a whole. If it be proved against him that he has abused this discretion and fraudulently misappropriated the family estate, he must account for that transaction. If it be proved generally that he is a bad manager, he will be liable to removal, unless he gives a good account of his management. But he cannot be compelled actually to render accounts, by a threat of removal, or for any other reason: Case law referred to. (*Odgers and Jackson, JJ.*) MANNAVEDAN *v.* SREEDEVI. **100 I.C. 607=50 Mad. 431=25 M.L.W. 234=38 M.L.T. 112=A.I.R. 1927 Mad. 422=52 M.L.J. 277.**

—The karnavan is not a mere trustee like the officer of a corporation, but his position is fully recognised as that of a manager of an undivided Hindu family. (*Oldfield and Devadoss, JJ.*) MEENAKSHI NETHARAMMAL *v.* CHERIA PARWATI NETHIAR. **74 I.C. 1012=1923 M.W.N. 657=A.I.R. 1924 Mad. 174.**

—Karnavan—Powers of.

———*Restriction by karar—Effect.*

It is a matter of frequent occurrence in Malabar that members of a tarwad agree by means of karars to have the rights of the existing karnavan restricted in certain particulars either by compelling him to associate some other junior with him in the management of the tarwad properties or by putting other restrictions on his power. The effect of such karars is only to limit the powers of the particular karnavan concerned and persons who were only junior members at the time would not be bound by such restrictions when they become in their turn karnavans of the tarwad, unless by themselves being parties to the karar, they have expressed themselves to be bound

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by such provisions even when they become karnavans: 32 M.L.J. 323 and A.I.R. 1927 Mad. 887, Ref.

The same principle would apply to cases where restrictions are imposed by decree of Court on a person who was the *de jure* karnavan on the date of the decree. Such restrictions would *prima facie* cease to have operation on the death of the particular karnavan concerned, unless there be something specific in or necessarily implied by the decree to the contrary. (*Beasley and Ananthakrishna Iyer, JJ.*) SANKUNNY *v.* KRISHNA. **107 I.C. 499=51 Mad. 320=27 M.L.W. 93=A.I.R. 1928 Mad. 465=54 M.L.J. 682.**

———*Right of management.*

A Court is not required to go into the question and investigate with meticulous care a transaction being prudent or otherwise, if there was necessity for entering into such a transaction for the purpose of raising the necessary amount. A karnavan has large powers of management, and to allow every transaction made or entered into by him to be made the subject of any such examination would virtually amount to a denial of that power of management: 35 M.L.J. 405 and A.I.R. 1923 Mad. 700, Foll. (*Wallace and Srinivasa Aiyangar, JJ.*) MOIDIN *v.* PAKKI MUSALIDAR. **108 I.C. 738 (Mad).**

—The karnavan of a Malabar tarwad stands in an exceptional position. He is the only person entitled to represent the family and demise the property belonging to the family and to give a discharge in respect of outstandings due to the family. No doubt his powers could be curtailed by an arrangement entered into among the members of the family. But such an arrangement affects the members of the family only and not strangers unless strangers are also parties thereto. (*Devadoss, J.*) VASAVA MENON *v.* KELU ACHAN. **97 I.C. 735=1926 M.W.N. 648=A.I.R. 1926 Mad. 1087.**

—A karar executed by a karnavan in which the senior Anandravan is to carry on the management under the karnavan by virtue of a muktyarnamah will not deprive the Karnavan of his position as Karnavan who is entitled to grant a melcharth binding on the tarwad on proper occasions and for proper necessities. (5 M.L.W. 511, Foll.) (*Sadasiva Aiyar and Spencer, JJ.*) KRISHNA MENON *v.* KRISHNA NAIR. **62 I.C. 598=13 M.L.W. 584=A.I.R. 1921 Mad. 520=40 M.L.J. 338.**

—Karnavan—Removal of.

Under a *karar* separate properties were allotted for the *Bhakshana chilavu* or the maintenance of the parties and properties were allotted for the *menchilavu* expenses separately. A suit was brought for the removal of the defendant who was the karar karnavan from the management of the *menchilavu* properties only. It was found that the *menchilavu* properties were the private properties of the various sub-branches of the tavazhi.

Held: that the defendant could not be regarded as karnavan of those properties, and a suit for his removal from the management of those properties was maintainable. (*Madhavan Nair, J.*) P. BAVANTHIL TAVAZHI *v.* P. M. MANNADIAR. **22 M.L.W. 149=A.I.R. 1925 Mad. 1129.**

—Karnavan—Right of Junior Members.

———*Appointment by Court—Construction.*

A suit was instituted by 18 junior members of the tarwad for the removal of the then karnavan. The plaint proceeded to state that plaintiff 1 therein would be the person who would be entitled to management, and there was a prayer that plaintiff 1 should be

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appointed as manager. The plaint proceeded further to state that if for any reason the Court should feel inclined to associate any other member of the tarwad with plaintiff 1 in management, then plaintiff 1 should be appointed manager in conjunction with plaintiff 3. There was a second plaintiff in that case who was senior to plaintiff 3 but nothing was alleged, in the proceedings in suit about plaintiff 2. The Court passed a decree declaring that plaintiffs 1 and 3 be appointed to the management. Plaintiff 1 then died and plaintiff 3 asserted that he was entitled to the management in preference to plaintiff 2.

Held: that plaintiff 3 was only appointed to associate himself with the then *de jure* karnavan, the then plaintiff 1, and that plaintiff 3's appointment *ipso facto* ceased the moment plaintiff 1 died and that plaintiff 2 became the karnavan. (*Beasley and Ananthakrishna Aiyar, JJ.*) SANKUNNY *v.* KRISHNA.

107 I.C. 499=51 Mad. 320=27 M.L.W. 93= A.I.R. 1928 Mad. 465=54 M.L.J. 682.

—Landlord and Tenant.

Notice by one of the two Uralans of a Dewaswam to determine a lawfully created tenancy is invalid. (*Ramesam and Wallace, JJ.*) KANNAN KUTTY *v.* ELAYA VEETIL VELU.

80 I.C. 139=19 M.L.W. 115= 1924 M.W.N. 151=A.I.R. 1924 Mad. 771= 46 M.L.J. 122.

—A condition in the lease that the landlord must give the value of the Kuzhijurs and Chamayams to the tenant on his eviction does not dispense with the necessity of notice to quit. (*Ramesam and Wallace, JJ.*) KANNAN KUTTY *v.* V. ELAYA VEETIL VELU.

80 I.C. 139=19 M.L.W. 115=1924 M.W.N. 151= A.I.R. 1924 Mad. 771=46 M.L.J. 122.

———*Uralans—Fresh lease from one.*

Acceptance of an invalid lease of property belonging to two Uralans, from one of the two Uralans by a tenant who held under a lease from both the Uralans from year to year does not prevent the lessee from falling back on the original lease. (*Ramesam and Wallace, JJ.*) KANNAN KUTTY *v.* ELAYA VEETIL VELU.

80 I.C. 139=19 M.L.W. 115= 1924 M.W.N. 151=A.I.R. 1924 Mad. 771= 46 M.L.J. 122.

———*Lease—Renewal—Construction.*

A Taraga, the purpose of which was to enable the tenant, or the lessee, to reclaim demised land and make improvements thereon, ran as follows: "I shall well improve the paramba and plant...&c. When the improvements have survived the period of decay and the cocoanut trees begin to bear their first fruits, I shall take a *taraga* after fixing the rent in accordance with the local custom, on an inspection of the kuzhikanoms."

Held, that the words meant that the parties intended that if the tenant made any improvements and those improvements were effective, he would be entitled as of right to a lease for another term of 12 years from the date of the expiry of the prior lease, and the rent was to be revised in view of any larger yield from the land, that may accrue and also having regard to the custom of the country with respect to such a lease. 30 Mad. 300, Dist. S. A. 1423 of 1901, Foll. (*Abdur Rahim and Odgers, JJ.*) (KAITHAL) KUTTALI *v.* K. P T. K. UMMAMMA AMMA.

62 I.C. 62=44 Mad. 509=13 M.L.W. 208= 1921 M.W.N. 169=A.I.R. 1921 Mad. 80= 41 M.L.J. 202.

———*Lease—Duration—Presumption.*

If the nature of agricultural tenancy is not proved, then even as regards agricultural leases in Malabar,

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the presumption is that the tenancy is from year to year, if the tenants have no additional mortgage-rights as in *kanom* tenures. (*Sadasiva Aiyar and Napier, JJ.*) ITTINAN *v.* GOVINDAN NAMBUDRI.

62 I.C. 390=13 M.L.W. 397.

—Land Tenure.

———*Karam Kozhu—Forfeiture.*

Land held on *karam kozhu* tenure whether in North or South Malabar is not liable to forfeiture by alienation. (*Madhavan Nair, J.*) KRISHNAN NAMBUDRIPAD *v.* KUNHAN NAIR.

86 I.C. 294= A.I.R. 1925 Mad. 914.

———*Anubhavam—Forfeiture.*

Quaere—Whether an *anubhavam* tenure in Malabar can be forfeited for denial of landlord's title. (*Napier and Odgers, JJ.*) SREDHARAM VALIA RAJAH *v.* NARAYANA.

71 I.C. 270= 1921 M.W.N. 639=41 M.L.J. 525.

—Land Tenure—Saswatham lease.

———*Binding nature.*

Whether a *saswatham* lease is binding or not is a mixed question of law and fact. The validity of a *saswatham* demise after the life-time of the grantor will depend on whether it was for the benefit of the *stanom* or not. 44 M. 509 Rel. (*Ayling and Odgers, JJ. afterwards. Spencer and Venkatasubba Row, JJ.*) KELU KARUP *v.* RAMAN NAIR.

73 I.C. 275= A.I.R. 1924 Mad. 247.

—Maintenance.

———*Suit for—Parties.*

A suit for maintenance on the ground that the tarwad had acquired some additional property after the karar was entered into should include all the members of the *tavazhi*. A suit for maintenance only for certain members of the *tavazhi* is bad. (*Devadoss, J.*) MAYANKUTTI *v.* KATHIRI.

86 I.C. 747=21 M.L.W. 224= A.I.R. 1925 Mad. 441.

———*Limits of—Right.*

In a Malabar tarwad, a member is entitled to be maintained out of its income but he is not entitled to a specific share of the income. The karnavan is entitled to use the income in any way he likes and no member is entitled to ask for an account, provided, of course, the karnavan does not misuse the income or refuse to maintain a member of the family.

Where, by a Karar, certain properties were allotted to the plaintiff's *tavazhi* and some other properties were allotted to the maintenance of some other *tavazhi*.

Held: that so long as the karar was in force it was not open to the plaintiffs to come forward and say that they should be given maintenance, out of some property which was not the subject of the karar. (*Devadoss, J.*) MAYANKUTTI *v.* KATHIRI.

86 I.C. 747=21 M.L.W. 224= A.I.R. 1925 Mad. 441.

———*Personal decree.*

A decree for arrears of maintenance personally against the Karnavan in the following terms: "that the 1st defendant personally and as Karnavan of his tarwad do pay....." does not seem to be right in ordinary cases. (*Schwabe, C. J. and Wallace, J.*) HAJI KARNAVAN *v.* KUNHAMAYAN.

72 I.C. 833= 17 M.L.W. 536=32 M.L.T.366= 1923 M.W.N. 247=46 Mad. 567= A.I.R. 1923 Mad. 280=44 M.L.J 212.

———*Considerations.*

The members of the tarwad are entitled to receive maintenance out of the tarwad house, when there is no room for them in that house, and, if the karnavan makes an insufficient allowance, the anandravans are

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entitled to apply to the Court to determine what allowance is sufficient, having regard to the circumstances of the family. The general principle is this: *Prima facie* the junior members living out of the tarwad house should be treated equally but the circumstances of each particular one can be taken into consideration and it is for the karnavan to judge how much each particular one should get. He may take into consideration things like the health of a particular child or the education of a particularly intelligent child or a child with small intelligence; he can take into account the earning capacity of a junior member; apparently it has been laid down that he can also take into account the fact that a particular person has himself made a rich marriage; and there are many other things which the karnavan in exercising his discretion, as, so to speak, the father of this family can take into consideration. It is enough to say that, on any such application to the Court, very great weight indeed should be given to the decision of the karnavan, and his decision in such a matter would not be lightly interfered with. (*Schwabe, C. J. and Wallace, J.*) HAJI KARNAVAN *v.* KUNHAMAYAN. **72 I.C. 833=17 M.L.W. 536=32 M.L.T. 366=1923 M.W.N. 247=45 Mad. 567=A.I.R. 1923 Mad. 280=44 M.L.J. 212.**

—Maintenance arrangement.

———*Modification.*

Mere maintenance arrangements are usually subject to modification if there is an appreciable or material change in the circumstances, of the family: (1913) M.W.N. 379, Ref. (*Waller and Madhavan Nair, JJ.*) SARA UMMA *v.* KUNHAMMAD. **94 I.C. 508=23 M.L.W. 584=A.I.R. 1926 Mad. 810.**

———*Binding nature.*

Where in a suit for maintenance against the karnavan by the junior members of a tarwad it was found that a maintenance arrangement was entered into by a previous karnavan for his lifetime:

Held: that the entire tarwad must be represented in the suit in order to give a decree for maintenance against the tarwad property. Moreover, in order to give effect to the plaintiffs' right to maintenance it may be necessary to substitute a new arrangement in the place of the existing one. The law is well settled that a karnavan cannot set aside an existing maintenance arrangement unless he makes some other suitable arrangement. The plaintiff's right to maintenance may be given effect to possibly without altering the existing arrangements by some slight adjustment. These and other necessary relevant questions can be considered and decided only in a suit in which the entire tarwad is properly represented. (*Waller and Madhavan Nair, JJ.*) SARA UMMA *v.* KUNHAMMAD. **94 I.C. 508=23 M.L.W. 584=A.I.R. 1926 Mad. 810.**

———*Setting aside—Enhancing—Parties—Conditions.*

In a suit by some junior members of a tarwad claiming maintenance from the karnavan of their tarwad the karnavan contended that the plaintiffs were not entitled to bring the suit without impleading the other members of the tarwad or at any rate the other members of their tavazhi, because in 1886, the then karnavan entered into a karar with plaintiffs' ancestress by which certain properties were allotted for her family's maintenance. It was perfectly clear from the recital and from the various references to "tavazhis" that the allotment was one made to the tavazhi, including future members. It was not denied that the members of the plaintiffs' tavazhi remained

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in possession of the properties allotted to them and consequently plaintiffs as members of the tavazhi were entitled to the benefits of the allotment and it appeared that plaintiffs had been obtaining their benefit at any rate shortly before the suit.

Held: that if plaintiffs wanted to set aside the arrangement they must implead the other members of the tarwad or at least the other members of their tavazhi who were in possession of tarwad properties in lieu of maintenance and might claim enhanced maintenance if they thought that the circumstances of their family warranted the claim but it was not open to them to have the benefit of an allotment for maintenance to their tavazhi and to seek to add to it a separate allotment for each individual ignoring the benefits which they were already receiving. (*Phillips, J.*) KUNHAMMAD *v.* SARA UMMA. **90 I.C. 849=A.I.R. 1925 Mad. 1158=49 M.L.J. 121.**

—An arrangement for maintenance made by a karnavan cannot be set aside by his successor except for good cause. (*Phillips, J.*) KUNHAMMAD *v.* SARA UMMA. **90 I. C. 849=A. I. R. 1925 Mad. 1158=49 M. L. J. 121.**

—Maintenance—Nature.

The English word "maintenance" is not a correct equivalent of the Malayalam word "chilavu" of which it is generally understood to be a translation. The term means "expenses" and is comprehensive in its significance. (*Odgers and Madhavan Nair, JJ.*) SHESHAPPA SHETTY *v.* DEVARAJA SHETTY. **95 I. C. 401=24 M. L. W. 269=1926 M.W.N. 413=49 Mad. 407=A. I. R. 1926 Mad. 723=50 M. L. J. 434.**

—Marumakkathayam.

———*Meaning.*

Mukkathayam law means merely a system of inheritance by sons as distinct from Marumakkathayam law a system of inheritance by daughters. (*Wallace and Srinivasa Ayyangar, JJ.*) KANDIYIL KUNDUN *v.* NEELAMBALATHA ANDI. **114 I. C. 338=A. I. R. 1929 Mad. 508.**

———*Partibility.*

It imports no custom either way on the question of partibility which must be established in each case. (*Wallace and Srinivasa Aiyangar, JJ.*) KANDIYIL KUNDAN *v.* NEELAMBALATHA ANDI. **114 I. C. 338=A. I. R. 1929 Mad. 508.**

———*Gift by husband—Estate taken.*

When a follower of Marumakkathayam law makes a gift of property to his wife and children, she having already children living by a former husband, the donees do not take the property with the incidents of tarwad property such as impartibility attached to it, but only as ordinary donees each entitled to an equal share as tenants-in-common. 16 Mad. 201 (F. B.). Dist. (*Krishnan and Venkatasubba Rao, JJ.*) (*Afterwards*) (*Venkatasubba Rao and Reilly, JJ.*) MOITHIAN *v.* PUTHIYAPURAYIL. **110 I. C. 480=28 M. L. W. 491=51 Mad. 574=1928 M. W. N. 331=A. I. R. 1928 Mad. 870=55 M. L. J. 208.**

———*Management of tarwad—Order of right.*

The right to the management of the tarwad affairs in the case of a Marumakkathayam tarwad devolves on the seniormost male member according to Marumakkathayam law. When a karnavan is removed the next senior in age becomes the *de jure* manager and karnavan and steps into the position *ipso facto* without any sort of appointment by the Court. The only means by which such rights of karnavanship could be lost to the seniormost members are: (1) by removal by decree of Court; (2) renunciation by act of party; and

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(3) by death. (*Beasley and Ananthakrishna Iyer, JJ.*) SANKUNNI *v.* KRISHNA. **107 I. C. 499= 51 Mad. 320=27 M. L. W. 93= A. I. R. 1928 Mad. 465=54 M. L. J. 682.**

———*Law governing.*

The Mukkathayam Thiyyas are governed by the customary law and when a question arises as to what is the rule of law governing them on any particular matter, the Court has to see what is the rule of customary law obtaining amongst them in that matter and in cases which are not sufficiently covered by prior decisions, the question will have to be determined with reference to the evidence in the case: 17 Mad. 184, Expl. 19 Mad. 440 and 19 Mad. 1, Ref.

In the absence of any satisfactory evidence to show what exactly is the rule of the customary law in any particular point, the rule of Hindu law on that point must be presumed and adopted to be the rule of the customary law obtaining amongst the community on that point. The presumption therefore will be useful and will hold good only if satisfactory evidence is not forthcoming as to what is the rule of the customary law; 39 M. L. J. 427 and S. A. 2092 of 1920, Diss. from. 15 Mad. 281, Expl. and Foll. A. I. R. 1921 Mad. 661, Ref. (*Waller and Madhavan Nair, JJ.*) PATTUKKA YAL CHAKUTTI *v.* KOTHEMBRA CHANDU KUTTI. **105 I. C. 55=39 M. L. T. 314= A. I. R. 1927 Mad. 877=53 M. L. J. 368.**

———*Gift to daughter—Estate taken.*

Where a Mahomedan of the North Malabar who followed the Marumakkathayam law executed a gift deed in favour of his daughter which recited after giving the property to her in the singular as follows "in future except for you and your offspring (Santhanam) there is no claim, concern or right of entry for me over this paramba * * * * you and your Santhanams should hold the said paramba in possession and enjoy the same as your jenmom."

Held: that the property became putravakasam property belonging to the donee's tavazhi and not the absolute estate of the donee. (*Wallace, J.*) KUNHAMMAD KUTTI *v.* CHERIA MAMMAD. **79 I.C. 886= 20 M.L.W. 41=34 M.L.T 238=1924 M.W.N. 430= A.I.R. 1924 Mad. 787=47 M.L.J. 679.**

———*Right of male members.*

There is no custom among the Marumakkathayam Mappillas of North Malabar by which males are treated as having no right to be consulted in the managements of the affairs of the tarwad or tavazhi and no right to participate in the income of the tarwad or tavazhi properties. This property cannot be settled as *Strisothu* on the female members of a tarwad or tavazhi to the exclusion of the males or so as at least to authorize the female members to sell the family property otherwise than for necessary tarwad purposes without the consent of the males. (*Spencer, Kumaraswamy Sastry and Ramesam, JJ.*) MUHAMMAD KUNHI *v.* PACKRICHI UMMA. **72 I.C. 671=46 Mad. 650=18 M.L.W. 502= 1923 M.W.N. 849=A.I.R. 1924 Mad. 28 (F. B.)**

———*Custom as to—Validity.*

It may be proved that by family custom Marumakkathayam Law and not Muhammadan Law applies to succession to the property of a Muhammadan in Malabar. Such a custom is neither immoral nor opposed to public policy. Moore's Malabar Law and Custom, p. 326 not Foll.; 15 W. R. 47, (P.C.) Dist. 22 Mad. 494, Foll. (*Oldfield and Ramesam, JJ.*) P. K. VATTOLI KALANDAR *v.* K.V. PUTHAVARAM KALANDAR. **69 I.C. 570= 14 M.L.W. 702=1921 M.W.N. 754= A.I.R. 1921 Mad. 694=41 M.L.J. 437.**

MALABAR LAW—Stanom.

—Mortgage.

———*Kumki and warg lands—Improvements.*

In South Kanara, a usufructuary mortgagee when put in possession by the mortgagor of kumki lands along with warg lands, the latter alone being specified in the mortgage deed, is entitled to the value of improvements effected by him not only in respect of warg land, but also in respect of kumki land, even though the express agreement for compensation refers to warg lands only: 24 M.L.J. 397 and 15 I.C. 278, Ref. (*Beasley, C. J. and Pandalai, J.*) VASTEVA HOLLA *v.* P. MAHABALA RAO. **31 M.L.W. 534= A.I.R. 1930 Mad. 674=58 M.L.J. 575.**

—Numbudris—Custom.

No custom was proved among the Payyanoor Gramam Nambudiris by which self-acquisition of a male member dying intestate devolves upon his tavazhi, in the absence of his wife and children. (*Devadoss, J.*) PARAMESHWARA TIRUMUMPA *v.* NARAYANA TIRUMUMPA. **107 I. C. 655= A.I.R. 1928 Mad. 172.**

—Nambudris—Disqualification to manage.

Convictions for a criminal offence and absence of readmission into caste after return from jail, disqualifies a Nambudri for the right of management of *illom* properties. (*Krishnan, J.*) HARIHARA AIYAR *v.* UKKANDAN VARIAR. **81 I.C. 498=A.I.R. 1925 Mad. 207.**

—Nambudris—Law Governing.

The Hindu Law as contained in the Mitakshara is the law that governs the Namboodris at Malabar save in so far as it is proved to have been modified by usage or custom having the force of law. Therefore in the absence of either party proving that a special usage or custom not known to the ordinary Hindu Law has been established by precedents or otherwise, Courts will ordinarily apply only the Hindu Law to Namboodris. (*Jackson, J.*) T.M. NARAYANAN NAMBUDRI *v.* K. RAVUNNI NAIR. **84 I.C. 973= 20 M.L.W. 876=35 M.L.T. 127= 1924 M.W.N. 792=A.I.R. 1925 Mad. 260= 47 M. L. J. 686.**

—Nambudris—Mortgage by 'de facto' guardian.

Where the illom of a Namboodri consisted of a father who was an idiot, his two sons who were minors and their step-mother who was managing the household and looking after the minors and where the step mother borrowed money on mortgage of family properties for family necessity and a suit was brought to enforce the mortgage,

Held: that there was no authority of the mortgagor either as guardian of the members of the family or its surviving efficient member to mortgage the family estate and that the mortgage was not enforceable against the family properties since a mere *de facto* guardian has no such power. (*Jackson, J.*) T. M. NARAYANAN NAMBUDRI *v.* K. RAMUNNI NAIR. **84 I.C. 973=20 M.L.W. 876=35 M.L.T. 127= 1924 M.W.N. 792=A.I.R. 1925 Mad. 260= 47 M.L.J. 686.**

—Stanom.

———*Stanomdar's leasing powers.*

The stanomdar is entitled to grant a lease for a term exceeding his own life-time, so as to make it binding on his successor, provided the lease is such as is beneficial to the estate. Moore's Malabar Law pp. 349 and 351, Ref. to. (*Abdur Rahim and Odgers, JJ.*) KUTTALI *v.* UMMAMMA AMMA. **62 I.C. 62=44 Mad. 509=13 M.L.W. 208= 1921 M.W.N. 169=A.I.R. 1921 Mad. 80= 41 M.L.J. 202.**

MALABAR LAW—Tarwad Debts. —Tarwad.

———*Debts*—'*Necessity.*'

Payment of kist does not of itself constitute a necessity to borrow. (*Walsh, J.*) EROCHAN MENOKI *v.* PUNNASSERI ELEVANA. **A.I.R. 1930 Mad. 821.**

———*Children of male members—Rights.*

The children born of male members of a Marumakkathayam tarwad are not members of that tarwad and in the absence of *bona fide* disputes requiring settlement the principles regarding family settlement are not applicable to a virtual partition of tavazhi properties allotting to them certain shares in that property : 39 Mad. 317, Foll.; *Stapleton v. Stapleton* : (White and Tudor's Leading Cases), 1 Equity 234, Ref. (*Ananthakrishna Ayyar, J.*) PAKKARAN *v.* PATHUMMA UMMA. **A.I.R. 1930 Mad. 541.**

———*Management.*

There is nothing to prevent the members of a tarwad agreeing to or acquiescing in the management being in the senior female, and if the evidence be sufficient to establish their consent or acquiescence, there would be nothing illegal in such an arrangement. Such an arrangement can also be established by proof of general custom. (*Wallace, J.*) (PUTHALATH) CHATTI SOOPI *v.* CHAMBATAM VEETIL KANNAN NAYAR. **1929 M.W.N. 873=A.I.R. 1930 Mad. 418.**

———*Representation by Karnavan.*

Where the tarwad, having notice of an appeal through its karnavan by whom it was throughout represented, does not choose to appear, it cannot be said that it was not represented in the appeal and a decree passed will be binding on it although the karnavan did not contest the appeal. (*Wallace, J.*) THIRUVENGADAM MAMMAD *v.* CHATHAMKARA AMMAD. **114 I.C. 230=A.I.R. 1929 Mad. 89.**

———*Members can be made parties to suit.*

The contention cannot be upheld that except against the karnavan as the sole defendant in the case no suit can be instituted or claim enforced in a Court of law if the property with reference to which the decree would be obtained is the property of the tarwad and it was intended by the plaintiff to bind all the members of the tarwad by the adjudication. There is no principle or rule of procedure preventing all the members of the tarwad from being made parties to the suit and afforded an opportunity to plead to the particular claim. (*Srinivasa Aiyangar and Curgenven, JJ.*) AMMALU AMMA *v.* NARAYANAN NAIR. **111 I.C. 210=51 Mad. 549=29 M.L.W. 460= A.I.R. 1928 Mad. 509.**

———*Junior members' acts cannot bind family.*

The fact that a junior member of a Malabar tarwad is either a consenting party to or was cognizant of the use of the family property in a particular way by strangers would not necessarily bind the family or the karnavan. (*Devadoss, J.*) MANNATTIL KRISHNAN NAIR *v.* SIVARAMAKRISHNA PATTAR. **98 I.C. 619=24 M.L.W. 691=A.I.R. 1927 Mad. 73.**

———*Property in the name of Karnavan and Anandravan—Pre-umption.*

There is a very strong presumption that property standing in the name of a karnavan belongs to the tarwad. But a similar presumption does not arise in the case of an anandravan. Ordinarily an anandravan has no private property, but is only a member of the tarwad which owns properties, but when there is property standing in the name of an anandravan and it is not shown that he has been in possession of tarwad funds, the presumption in favour of the property being tarwad property is very slight, and it is open to the anandravan to show he had private money out of which he could acquire the property. (*Phillips*

MALABAR LAW—Tarwad.

and Ramesam, JJ.) AHMAD *v.* MANHA MAMMAD. **96 I.C. 86=23 M.L.W. 575=A.I.R. 1926 Mad. 643.**

———*Liability for debts of Karnavan.*

Where there is no evidence to show either that the money borrowed was spent on tavazhi purposes or that there was such a lack of tavazhi money that it was necessary to borrow, the mere fact that it was borrowed by karnavan for expenses of tavazhi, does not render the tarwad property liable : 22 Mad. 289 and 35 M.L.J. 96, Dist. (*Phillips and Ramesam, JJ.*) RAMA VADHYAR *v.* KRISHNAN NAIR. **93 I.C. 20= 23 M.L.W. 186=A.I.R. 1926 Mad. 398.**

———*Property of—Presumption.*

The mere recital in a gift deed that the property is jenmom property of the donors does not lead to any presumption or inference in law, that the property was in the hands of the donors as tarwad property. (*Wallace, J.*) K. JANAKI *v.* P. GOVINDAN. **85 I.C. 546=22 M.L.W 113=A.I.R. 1925 Mad. 990.**

———*Agreement between members—Binding nature.*

Under an agreement between members of a Malabar *tarwad* the *karnavan* for the time being was to forego certain rights of his as manager and the management of the tarwad property was entrusted partly to an *anandravan* of the tarwad and partly to another man. The Karnavan with some other members of the tarwad filed suit against one *anandravan* complaining of his mis-management. The *karnavan* died during suit and the defendant became the *karnavan*.

Held : that the defendant was bound by agreement, that the cause of action survived and that the other members who had joined as plaintiffs had right to continue the suit. (*Phillips and Odgers, JJ.*) SANKARAN *Alias* KUNHUNNI NAMBUDRIPAD *v.* VATAKKINIYEDATH KIRANGAT MANAKKAL. **90 I.C. 346=23 M.L.W. 205=A.I.R. 1925 Mad. 894. 48 M.L.J. 691.**

———*Denial of title by members—Effect.*

Where the members of a *tavazhi* were in possession of certain tarwad properties under a maintenance arrangement made by the *karnavan* and where they made a s'atement in a *karar* that those properties were the *jenmom* of the tavazhi and where a suit was instituted by some of the junior members of the *tarwad* for recovery of possession of the same, whereupon the title of the *tarwad* was admitted by the defendants but the value of improvements for the *tavazhi* was claimed by them :

Held : as the case was different from forfeiture by a tenant, of his rights in consequence of his denying the landlord's title, the possession of the defendants must not be taken away on the ground of the denial of title in the *karar*. (*Krishnan, J.*) CHATHU NAMBIAR *v.* SEKHARAN NAMBIAR. **85 I. C. 1050= 1925 M.W.N. 61=A.I.R. 1925 Mad. 430= 47 M.L.J. 695.**

———*Arrangement for enjoyment.*

An arrangement made by the *karnavan* for the enjoyment of the *tarwad* properties by the members thereof cannot be upset by the junior members of the *tarwad*. None but the *karnavan* can ask for return of possession of the properties. (*Krishnan, J.*) CHATHU NAMBIAR *v.* SEKHARAN NAMBIAR. **85 I.C. 1050=1925 M.W.N. 61= A.I.R. 1925 Mad. 430=47 M.L.J. 695.**

———Property given to a member for life by Tarwad reverts to Tarwad on his death.(*Madhavan Nair-J.*) THITHI KUTTI *v.* NELLAYYA VARNATH. **82 I. C. 183=1924 M. W. N. 526= A. I. R, 1925 Mad. 225.**

MALABAR LAW—Tarwad.

———A person managing property of Tarwad under arrangement with Tarwad, after Tarwad had given property to one of its members for life can sue for the property after the member's death though the member was no party to the arrangement. (*Madhavan Nair, J.*) THITHI KUTTI *v.* NELLAYA VARNATH.
82 I. C. 183=1924 M. W. N. 526=A.I.R. 1925 Mad. 225.

———*Acquisition of a member—Rights to.*

According to the law of Malabar, all acquisitions of any member of a family undisposed of at his death form part of the family property and do not go to the nephews but fall to the management of the eldest surviving male. It is also well settled that acquisitions made with the help of the funds of the acquirer's own *Thavazhi* owning *Puthravagasam* properties become the property of the *Thavazhi* and the *Karnavan* of the whole *tarwad* cannot claim them in opposition to the *Thavazhi*. The mere fact that the mother or the father or the *Thavazhi* was possessed of some funds as a nucleus is not sufficient to make out that the acquisitions by the male members of the *Thavazhi* were impressed with the character of *Thavazhi* property. 2 M. H, C. R. 162, Foll. (*Spencer and Devadoss, JJ.*) ABUVAKKAR *v.* KUNHI KUTTIYALI. **74 I.C. 21=16 M. L. W. 768=31 M. L. T. 389=A. I. R. 1923 Mad. 153.**

———*Sale by Karnavan—Necessity for—Major portion—Duty of Court.*

Where there was necessity for the sale to the extent of a substantial amount, *viz.*, Rs. 1,001 out of Rs. 1,400,

Held, that the proper course for the Courts to follow was to uphold the sale instead of directing it to be set aside on condition of the amount for which necessity was proved being paid. 27 M. L. J. 132; 1 M.L.W. 877; 3 M. L. W. 413,; 30 M. L. T. 14 and 14 C.W. N. 895, Foll.

In cases of mortgages different considerations arise from those which arise in cases of sales. 12. M. L. T. 264 and 17 Mad. 232. Dist.

In the absence of proof of any fraud or collusion on the part of the purchasers they cannot be compelled to account for the application of the sale proceeds or to pay any part of the price twice over, and so they are not bound to refund the difference between the consideration in the sale-deed and the amount found to be required for necessary purposes. 27 M. L. J. 132; (1915) M. W. N. 8; 3 M. L. W. 413; 30 M.L.T. 14, Dist.; 1 M.L.W. 877 and 14 C.W.N. 895 Ref. (*Spencer and Ramesam, JJ.*) KRISHNAN *v.* M. I. GOVINDAN. **69 I. C. 302=14 M. L. W. 539=1921 M. W. N. 715=A. I. R. 1921 Mad. 677=41 M. L. J. 381.**

———*Family—Karar—Binding nature.*

A family karar when not assented to by an individual member of the tarwad though assented to by a majority, is powerless to interfere with his personal birth right to succeed to all the powers of a Karnavan in due course of succession. 41 M. 577; 32 M. L. J. 323, Ref. (*Sadasiva Aiyar and Napier, JJ.*) MUKKIL MARUTHUR SANKARA MENON *v.* GOPALA MENON.
65 I. C. 805. (Mad.)

———*Karnavans as such trustees of Dewaswom—Breaches of trust—Illom not liable.*

Where under a scheme relating to a Devaswom the trustees are karnavans of their respective tarwads and the trusteeship is incident to the position of the karnavan, it does not follow from that,that the anandravans of these tarwads have either any rights of interfering with the management of the trust or any liabilities for breaches of trust which may be committed by the respective karnavans in the discharge of their duties as

MALABAR LAW—Tavazhi—Succession to.

trustees of the devaswom. (Case law referred). Hence the illom of a trustee is not liable for breach of trust by him, where there is no evidence that his money went into the hands of the tarwad. 1 M. 235 (P. C.), 2 M.L.W. 61 & 31 M.L.J. 733, Ref. (*Wallis, C. J. and Ramesam, J.*) MUTHUVAYA *v.* SANKARAN NAMBUDRIPAD. **63 I. C. 931=13 M. L. W. 369=A. I. R. 1921 Mad. 651.**

———*Property in the name of Junior member—Presumption.*

There is no presumption that a decree or bond standing in the name of a junior member belongs to the Tarwad. 2 M. 328, Foll. (*Sadasiva Aiyar, J.*) SUBRAMANIA PATTAR *v.* KRISHNA EMBRANDRI.
60 I. C. 77=12 M.L. W. 361=39 M.L.J. 590.

—Tavazhi—Succession to.

———The tavazhi which is nearest to an extinct tavazhi and from which the extinct tavazhi had separated at a later date than the others has preferential right of succession to the tavazhis which had separated earlier. (*Ramesam and Odgers, JJ.*) SANKUNNI PANIKAR *v.* RAMA PANIKKAR. **107 I. C. 429=A.I.R. 1929 Mad. 346.**

———*What constitutes.*

A tavazhi cannot be constituted by a woman and some of her children only, they being children of one father, others being excluded; and such a group of members is not a recognized group in Malabar law entitled to hold property with the special incidents of tarwad propety: *Sadasiva Iyer, J.*, in 39 Mad, 317 (F.B.) and 42 Mad, 869 Diss from. (*Krishnan and Venkatasubba Rao, JJ.*) (*afterwards*) (*Venkatasubba Rao and Reilly, JJ.*) MOITHIYAN *v.* PUTHIYAPURAYIL. **110 I.C. 480=51 Mad. 574=1928 M.W.N. 331=28 M.L.W. 491=A.I.R. 1928 Mad. 870=55 M.L.J. 208.**

———*How created.*

It is not open to any man, by his own act, to create a corporate unit not known to law and enable it to hold property with the incidents confined to such recognized units only.

A tavazhi, any more than a tarwad, cannot be created by act of parties; 39 Mad. 317 (326) (F,B.), Foll. (*Krishnan and Venkatasubba Rao, JJ.*) (*afterwards*) (*Venkatasubba Rao and Reilly, JJ.*) MOITHIYAN *v.* PUTHIAPURAYIL **110 I.C. 480=51 Mad. 574=1928 M.W.N. 331=28 M.L.W. 491=A.I.R. 1928 Mad. 870=55 M.L.J. 208.**

———*Karar by Tavazhis—Individual's rights.*

Where by a karar entered into by all the tavazhis constituting a tarwad it is agreed that the tarwad shall have no rights over the separate and self-acquired properties of the tavazhis, the last surviving member of one such tavazhi is solely entitled to the tavazhi properties. He can deal with them as he chooses. He is competent to dispose them of by a Will. There is no inchoate right of the tarwad over them which would revive on the extinction of the tavazhi and no member of the tarwad could get any right to them or interdict alienation. (*Krishnan and Venkatasubba Rao, JJ.*) N. T. V. THUNGA *v.* NANIKUTTY AMMA.
99 I.C. 511=38 M.L.T. 86=A.I.R. 1927 Mad. 371.

———*Death of a member—Succession to—Property.*

On the death of a male member of a Tavazhi his property goes not to the Tavazhi but to the Tarwad (32 Mad. 351, Foll); and unless it is shown that any person enjoyed the property after the death of the member adversely to the Tarwad either for himself or on behalf of the Tavazhi, the right of the Tarwad is not lost. (*Ramesam, J*) RAMAN MENON *v.* MADHAVAN MENON, **98 I.C. 860=A.I.R. 1927 Mad. 244.**

MALABAR LAW—Tavazhi.

———*Creation by implication.*

A *teer* deed was executed in favour of one child, but it was mentioned that it was also in favour of her brothers and sisters.

Held: that the effect of the document was to constitute the donees and their mother a *tavazhi*. 39 Mad. 317 (F. B.) Foll. (*Ramesam, J.*) PAPPI AMMA *v.* KUTTI MALU AMMA. **87 I.C. 198=21 M.L.W. 432= A.I.R. 1925 Mad. 761.**

———*Division for enjoyment—Powers of alienation.*

The properties of a tarwad were divided among three tavazhis composing it, for convenient management and enjoyment. It was stated that the members of the three tavazhis and their descendants were to enjoy the respective properties. The tavazhis were prohibited from charging the properties with any debts so as to bind the tarwad.

Held : that there was no restraint against the tavazhis, alienating their right in the properties derived under the deed in favour of a third person. The alienee could get a right co-extensive with the right held by the alienors. (*Devadoss, J.*) DAMODARA MENON *v.* RAMAKRISHNA AIYAR. **86 I.C. 443= 21 M.L.W. 362=A.I.R. 1925 Mad. 624.**

—Tavazhi—Succession to.

Under Marumakkathayam Law when a Tavazhi becomes extinct the Tavazhi from which it separated last succeeds to its properties in preference to others more nearly connected to the extinct tavazhi, by blood (*Madhavan Nair, J.*) GOPALA NAIR *v.* RAGHAVA NAIR. **86 I.C. 620=21 M.L.W. 215= A.I.R. 1925 Mad. 460.**

—Miscellaneous.

———*Extension—Duty of Courts.*

Malabar law being essentially customary law the process of solving questions, as they arise for decision by extending the operation of a custom by analogy, or by applying "inferences", from the Hindu Law, unless in the utter absence of evidence as regards custom, is bound to create a divergence between the Court-made law and the customary law as observed by the people. A principle enunciated with respect to certain circumstances cannot always be carried out to its logical conclusions and applied to all analogous circumstances; for, Law is not always logical. In cases of doubt, the proper procedure to be adopted is to call for a finding on the question as to the custom. (*Madhavan Nair, J.*) GOPALA NAIR *v.* RAGHAVA NAIR. **86 I.C. 620=21 M.L.W. 215= A.I.R. 1925 Mad. 460.**

MALABAR (RESTORATION OF ORDER) ORDINANCE (I of 1921.)

—Limitation.

S. 5, Limitation Act under which the Court can excuse delay is not one of the provisions, the application of which is extended by Act X of 1922 to proceedings under a special or local law. (*Oldfield and Ramesam, JJ.*) MITTOOR MOIDEEN HAJEE, *In re.* **71 I.C. 217=16 M.L.W. 764=24 Cr L. J. 89= A.I.R. 1923 Mad. 95=43 M.L.J. 561.**

—S. (4) (2) (b)—Special Magistrates.

———*Who can be appointed.*

The only persons, who under Ordinance I of 1922, Sect. 4 (2) (*b*) can legally be appointed Special Magistrates, are "Magistrates who have exercised the powers of a First Class Magistrate for not less than two years." Where the Special Magistrate was, on the date of appointment retired Deputy Collector, and had before and up to his retirement exercised first class powers for not less than two years.

Held, he had ceased to be a Magistrate and was not one when he was appointed a Special Magistrate under the ordinance. His appointment was therefore invalid. (*Oldfield and Ramesam, JJ.*) HAMED HAJI *v.* CROWN. **72 I.C. 381=24 Cr. L.J. 381= 17 M.L.W. 426=32 M.L.T. 195=1923 M.W.N. 288= A.I.R. 1923 Mad. 598=44 M.L.J. 428.**

—S. 10—Commission Examination.

S. 10 of the Malabar (Restoration of Order) Ordinance I of 1922 read with S. 503 of the Cr. P. C. does not authorise a special Judge acting under the Ordinance to issue a commission for the examination of witnesses. (*Ayling and Odgers, JJ.*) AYARVALI POKKER. **74 I.C. 952= 18 M.L.W. 899=1923 M.W.N. 758=24 Cr. L.J. 840= A.I.R. 1924 Mad. 243=45 M.L.J. 305.**

—S. 11—Appeal.

———*Forum.*

Where accused was convicted and sentenced to 4 years' rigorous imprisonment and fine, *held*, that the appeal from the sentence lies to the Special Judge and not the High Court. Since Act X of 1922, S. 12 of the Limitation Act has been made applicable to this act also. (*Oldfield and Ramesam, JJ.*) MITTOOR MOIDEN, *In re.* **71 I.C. 217=16 M.L.W. 764= 24 Cr. L.J. 89=A.I.R. 1923 Mad. 95=43 M.L.J. 561.**

MALICE.

See TORT.

MALICIOUS ARREST

See TORT.

MALICIOUS PROSECUTION.

Burden of proof.
Civil Action.
Damages.
Elements to be proved.
Innocence.
Malice.
Prosecution.
Reasonable and probable cause.

—Burden of Proof.

———*Suit for damages.*

The burden of proving want of reasonable and probable cause is on the plaintiff and the existence of malice should be independently proved and cannot be inferred merely from the absence of probable and reasonable cause. (*Jai Lal, J.*) NURKHAN *v.* JIWAN DAS. **99 I. C. 638= A. I. R. 1927 Lah. 120.**

—Burden of proof—Innocence.

———*Plaintiff must prove his innocence.*

In an action for malicious prosecution the plaintiff has to prove first that he was innocent and that his innocence was pronounced by the Tribunal before which the accusation was made. 11 Q. B. D. 440 followed. (*Lindsay and Stuart, JJ.*) GOBARDHAN SINGH *v.* RAM BADAN SINGH. **67 I. C. 65= 44 All. 485=20 A. L. J. 284= A.I. R. 1922 All. 209.**

—Burden of Proof—Test as to.

The question is not: "Did the plaintiff commit the offence" or did defendant invent the offence against plaintiff; the two queries exhausting the possibilities of the situation. The question is: Has plaintiff proved that defendant invented and instigated the whole proceedings for prosecution. (*Viscount Dunedin.*) BALBHADDARSINGH *v.* BADRI SAH. **95 I. C. 329=28 Bom. L. R. 921= 1 Luck. 215=24 A. L. J. 453=3 O.W.N. 499= 1926 M. W. N. 482=43 C. L. J. 521= 30 C. W. N. 866=29 O. C. 163=7 P. L. T. 591= 13 O. L. J. 749=A. I. R. 1926 P. C. 46= 51 M. L. J. 42. (P.C.)**

MALICIOUS PROSECUTION—Civil action.

In order to show the absence of reasonable and probable cause, there are minor questions which it is necessary to determine, the burden of proving each of those minor questions lies upon the plaintiffs, just as much as the burden of proving the whole does. "The test" as to the burden or onus of proof whichever term is used, is simply this; to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the Tribunal will have to say that, if the case stops there it must be decided in a particular manner. (*Abdul Raoof and Campbell, JJ.*) ABDUL SHAKUR *v.* LIPTON & CO. **72 I. C. 411=6 L. L. J. 1=A. I. R. 1924 Lah. 1.**

—Civil action.

———*Principles governing the right.*

Where damages are sought for the mere bringing and prosecution of a civil suit two main questions emerge. The first question is a question of the remoteness of the damage. The mere institution of the proceedings may, having regard to their character, involve damage to credit or reputation, damage to property in the sense that the defendant is put to expense, or damage to the person in the sense that he is liable to arrest. In such cases that damage is not remote but in any ordinary case the bringing of an ordinary action however maliciously and however great the want of reasonable and proper cause, will not support a subsequent action for malicious prosecution. Injury to plaintiff's business is not a ground for maintaining such a suit. The second question is as to what is meant by malice. There is some authority for the view that it is actionable for one person wilfully to injure a man in his trade if damage results to him, provided that if the real purpose is not to injure another, but to forward or defend one's own trade, then no wrong is committed and no action will lie, although damage to another ensues. In some cases malice is postulated as an element, meaning thereby that the act complained of is wilfully and knowingly done, or that it is done for the purpose of injuring another, but not as connoting personal enmity or spite or some other evil motive, *Wren* v. *Weild* (1869). 4 Q.B. 730 and *Sorrell* v. *Smith* (1925) A. C. 700, Foll. (*Rankin, C. J. and C. C. Ghose, J.*) IMPERIAL TOBACCO CO. *v.* ALBERT BONNAN. **106 I.C. 277=46 C.L.J. 455=A.I.R. 1928 Cal. 1.**

———*Acquittal on appeal no bar.*

Conviction by the trial Court but acquittal by the Court of appeal do not conclusively show that the charge by the defendant against the plaintiff was a *bona fide* charge and is no bar to a suit for malicious prosecution. (*Mukerji, J.*) MADHO SINGH *v.* MANGAL SINGH. **79 I.C. 1023=5 L.R.A. (Civ.) 375=A.I.R. 1924 All. 536.**

—Civil action—When lies.

———*Sanction proceedings.*

How far, proceedings for sanction to remove the bar to the institution of a prosecution instituted by the defendant, disclose a sufficient cause of action to found a claim of damages in malicious prosecution is a matter of considerable doubt. (*Mukerji, J.*) NAGENDRA NATH *v.* BASANT DAS. **57 Cal. 25=A.I.R. 1930 Cal. 392.**

———*Dismissal under S. 203, Cr. P. C.*

Where a complaint is dismissed under S. 203, Criminal P. C., before proceedings are commenced against the accused, no action for malicious prosecution lies as the subject matter of the suit has not reached the stage of the prosecution. The mere fact that the accused was present and cross-examined the witnesses on behalf of the complainant does not alter the character or the proceeding: 38 Cal. 880, Relon.; 17 C.W.N. 554, Dist. (*Das and Wort, JJ.*) SUBHAG *v.* NAND LAL. **118 I.C. 133=8 Pat. 285=10 P.L.T. 415=A.I.R. 1929 Pat. 271.**

MALICIOUS PROSECUTION—Civil action—When lies.

———*Dismissal under S. 107, Cr. P. C.*

Where the petition was one praying for action under S. 107 of the Criminal P. C., and was dismissed without issuing any notice to plaintiff, there was no prosecution of plaintiffs and consequently no action for damages for malicious prosecution would lie. (*Coutts-Trotter, C. J. and Viswanatha Sastry, J.*) SANJEEVI REDDI *v.* KONERI REDDI. **93 I.C. 8=49 Mad. 315=23 M.L.W. 327=A.I.R. 1926 Mad. 521=50 M.L.J. 460.**

———*Prosecution initially* bona fide.

A prosecution may not be *mala fide* in the beginning; but the continuance of such prosecution after it was discovered that the facts upon which it was based were not true may give rise to a claim for damages for malicious prosecution: *Fitzjohn* v. *Mackinder*, (1861) 30 L.J. C.P. 257; 30 Bom. 37; 30 All. 525 and 12 C.L.J. 410.Rel. on. (*Suhrawardy and Garlick, JJ.*) RABINDRA NATH *v.* JOGENDRA CHANDRA. **114 I.C. 796=56 Cal. 432=48 C.L.J. 339=33 C.W.N. 79=A.I.R. 1928 Cal. 691.**

———*Confession.*

A person is liable for prosecution starting on account of his implicating another man in a confession made by him though he himself did not lay any complaint. (*Dalal, J. C. and Cuming, A. J. C.*) BADRI SAH *v.* BALBHADDAR SINGH. **79 I.C. 697=10 O.L.J. 468=A.I.R. 1924 Oudh 145.**

———*Wrongful Civil Suit.*

Where the bringing of an action does, as a necessary consequence, involve an injury to property which cannot be compensated by the grant of costs in the action, a subsequent action for damages by defendant is not barred. Defendant, after agreeing to have the dispute as to the property with plaintiff decided by the award of a competent arbitrator, resiled after the award had been made, and instituted a suit against plaintiff in consequence of which she was deprived for a certain period of all rights to enforce the payment of certain debts due to her deceased husband with the result that their payment in certain instances became impossible owing to the action of the law of limitation:

Held she could not recover compensation by way of costs or under S. 144, C. P. C. The suit was therefore not barred. 42 C. 550 Diss. (*Stuart and Kanhaiya Lal, JJ.*) ARJUN SINGH *v.* PARBATI. **69 I.C. 173=20 A. L.J. 636=44 All. 687=A.I.R. 1922 All. 465.**

———*Sanction proceedings.*

The maintainability of a suit for malicious prosecution does not depend on there having been a prosecution in the sense in which the term is used in the Code of Criminal Procedure. The application for sanction is a preliminary or initial stage in a criminal prosecution and it is immaterial that this is done as the law required in a Civil and not a Criminal Court. 37 Cal. 358; 38 Cal. 880, Dist. The allegation that the defendant maliciously and without just, reasonable and probable cause instituted proceedings for sanction and that the plaintiff was obliged to defend the cases, are sufficient to disclose a cause of action. (*Teunon and Newbould, JJ.*) NARENDRANATH DE *v.* JYOTISH

MALICIOUS PROSECUTION— Damages—Assessment.

CHANDRA PAL. **67 I. C. 705=49 Cal. 1035=27 C.W.N. 387=A.I.R. 1922 Cal. 145.**

—Damages—Assessment.

———*Principles governing.*

In a suit for damages for malicious prosecution where it is found that the plaintiff has not spent anything towards the expense of defence, the amount being paid by another person and there being no legal liability to repay the amount so provided, no damages can be awarded, the plaintiff having failed to prove that he had sustained any damages as the result of prosecution. So also no claim for damage can be made on ground that plaintiff's shop was shut during trial when no damage is proved from that cause. A mere statement that plaintiff pays a certain income-tax does not show that any part of it was earned in trading on a particular shop and does not serve as basis for damages. (*Young and Sen, JJ.*) GYASIRAM *v.* KISHORE. **122 I.C. 185=A. I. R. 1930 All. 165.**

———*Principles governing.*

Damages for malicious prosecution are awarded to compensate the plaintiff for expenses incurred in the prosecution, pain to mind and body, and the loss of reputation, etc., which he has actually suffered, and not for injuries which he might have suffered, if he had been convicted. (*Kendall, J.*) SUKH NANDAN SAROOP *v.* FAZUL HUSAIN. **100 I.C. 449=A.I R. 1927 All. 412.**

—In awarding damages to the successful plaintiff in a suit for malicious prosecution all legitimate expenses incurred by him or by her for establishing his or her innocence in the criminal case can be allowed. (*Kinkhede, A. J. C.*) VITHOBA *v.* BHIMAI. **82 I.C. 1014=A.I.R. 1925 Nag. 216.**

—Elements to be proved.

———*Action for—Elements.*

The first thing a plaintiff suing for damages for malicious prosecution must do is to show that he was acquitted of such charge. If he is found guilty by the Court before whom he was prosecuted, it cannot be said that he was maliciously prosecuted. 1 Luck, 215 (P.C.), Ref. to. (*Misra and Pullan, JJ.*) MATA PRASAD *v.* SECRETARY OF STATE FOR INDIA. **5 Luck 157.**

———*Falsity of Charge.*

In a suit for damages for malicious prosecution the plaintiff has not to prove that the charge brought against him was false : A. I. R. 1926 P. C. 46, Foll. (*Dalal, J.*) RAMADHAR PANDE *v.* AMARAJI. **117 I. C. 368.**

—In an action for malicious prosecution the plaintiff has to prove : (1) that he was prosecuted by the defendant ; (2) that the prosecution terminated in his favour ; (3) that it was instituted without any reasonable and probable cause ; and (4) that it was due to a malicious intention of the defendant. It is not at all incumbent upon the plaintiff to prove that he was innocent of the charge upon which he was tried. But, if the defendant pleads that his complaint was true and leads evidence to substantiate it, the question of the truth or falsity of the complaint may arise at the instance of the defendant. And, when such facts are professed to be within the knowledge of the defendant, the question of the truth or falsity of the complaint may also determine the question of want of reasonable and probable cause. The judgments of the criminal Courts are conclusive for the purpose of showing that the prosecution terminated in favour of the plaintiff, but the findings of the criminal Courts by themselves are not evidence of malice or

MALICIOUS PROSECUTION—Elements to be proved.

want of reasonable and probable cause. It is for the civil Court to go into all the evidence and decide for itself whether such malice or cause existed or not : 10 A.L.J. 423 ; 11 A.L.J. 125 ; A. I. R. 1924, All. 536 ; A. I. R. 1928 P. C. 46, Rel. on. ; 12 C. L. J. 410, and 21 All. 26, Dist. (*Sulaiman and Kendall, JJ.*) SHUBRATI *v.* SHAMSUDDIN. **110 I. C. 413=50 All. 713=26 A. L. J. 439=A. I. R. 1928 All. 337.**

—In a suit for malicious prosecution even though the plaintiff has not to prove innocence still he has to prove not only that the criminal proceedings terminated in his favour but also that the defendant (complainant) acted without reasonable and probable cause: A. I. R. 1926 P. C, 46, Foll. (*Harrison, J.*) PARTAP SINGH *v.* HARI SINGH. **108 I. C. 397=29 P. L. R. 366.(Lah.)**

———*Wicked Motive.*

In the class of actions to which a claim of damages for malicious prosecution belongs the state of the defendant's mind at the time when he did the act is most important. The plaintiff cannot succeed unless he can show either guilty knowledge or some wicked or indirect motive in the defendant. The general principle of the Common Law is that an action for malicious prosecution lies whenever one man puts the process of the law in motion against another maliciously and without reasonable and probable cause. Even in cases in which personal element constitutes the essence of the offence there may be certain facts which may afford an answer to the prosecution and on determination of such facts, will depend the answer to the question as to whether there was or was not reasonable and probable cause for the prosecution : A. I. R. 1926 P. C. 46, Foll. ; (1889) A. W. N. 189 and 11 A. L. J. 125, not Foll. (*Wazir Hasan, J.*) SHIVARATAN *v.* RAM SAMRAN. **101 I, C. 274=2 Luck. 487=4 O. W. N. 270=A. I. R, 1928 Oudh 145.**

—To succeed in a case for malicious prosecution, the plaintiff must prove (1) that he was prosecuted by the defendant ; (2) that the proceedings complained of terminated in favour of the plaintiff, if from their nature they were capable of so terminating ; (3) that the prosecution was instituted against him without any reasonable and probable cause; and (4) that it was due to a malicious intention of the defendant and not with a mere intention of carrying the law into effect: A.I.R. 1926 P.C. 46, Foll. ; 8 L.B.R. 78, held no good law. (*Baguley, J.*) U. SOE *v.* MAUNG NGWE THA. **106 I. C. 654=5 Rang. 705=A. I. R. 1928 Rang. 51.**

—In an action for malicious prosecution the plaintiff has to prove that he was prosecuted by the defendant; that the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating, that the prosecution was instituted against him without any reasonable and probable cause and that it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect.

A prosecution comes to an end even when a Magistrate declines to commit. (*Viscount Dunedin*) BALBHADDARSINGH *v.* BADRI SAHI. **95 I.C. 329=1 Luck. 215=24 A.L.J. 453=3 O.W.N. 499=28 Bom. L.R. 921=1926 M.W.N. 482=43 C.L.J. 521=30 C.W.N. 866=29 O. C. 163=7 P.L.T. 591=13 O.L.J. 749=A. I. R. 1926 P.C. 46=51 M.L.J. 42. (P.C.)**

—In a suit for malicious prosecution the plaintiff has to prove: first, that he was innocent and that his in-

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nocence was conclusively made out; secondly, that there was no reasonable or probable cause for the prosecution ; and lastly, that the proceedings were instituted with a malicious spirit and not in furtherance of justice. (*Fawcett and Madgavkar, JJ.*) ALAMKHAN *v.* BANEMIYA. **95 I.C. 39=28 Bom. L.R. 459= A.I.R. 1926 Bom. 306.**

—In a case of damages for malicious prosecution the plaintiff must prove the absence of reasonable and probable cause : 8 O.L.J. 147. *Foll.* (*Wazir Hasan, A..J.C.*) NAND LAL *v.* DEBI DIN. **91 I.C. 223. (Oudh.**

——*Proof of the former alone is not sufficient.*

To succeed in an action for malicious prosecution the plaintiff must allege and establish both (a) absence of reasonable and probable cause and (b) malice, and must fail altogether if he fails to establish both. The malice necessary to be established is not, even malice in law, such as may be assumed from the intentional doing of a wrongful act, but malice in fact ; *malus animus* indicating that the party was actuated either by spite or ill-will towards any individual or by indirect or improper motives though these may be wholly unconnected with any uncharitable feeling towards anybody.. (*Abdul Raoof and Campbell, JJ.*) ABDUL SHAKUR *v.* LIPTON & CO. **72 I.C. 411= 6 L.L.J. 1= A.I.R. 1924 Lah. 1.**

—Plaintiff has to prove in a malicious prosecution suit (1) prosecution by defendant, (2) plaintiff's innocence, (3) want of reasonable and probable cause, (4) malicious intention of the defendants.

Grounds raising suspicion about plaintiff's guilt that would be sufficient to save plaintiff from conviction are not sufficient in a civil suit. (*Dalal, J. C. and Cuming, A.J.C.*) BADRI SAH *v.* BALBHADDAR SINGH. **79 I.C. 697=10 O.L.J. 468= A.I.R 1924 Oudh 145.**

—To succeed in an action for malicious prosecution the plaintiff must prove the following four essentials:—(1) that the defendant instituted criminal proceedings against him before a judicial officer; (2) that in so doing he acted without reasonable and probable cause; (3) that in so doing he acted maliciously; and (4) that the proceedings terminated in the plaintiff's favour. If at the commencement of the prosecution, reasonable and probable cause was in existence or is not shown to have been absent, theaction for malicious prosecution must fail. (*Wazir Hasan, A.J.C.*) KAZIM HUSAIN *v.* BASIT HUSAIN. **61 I.C. 970= 8 O.L.J. 147=A.I.R 1921 Oudh 1.**

—Good faith—Plea of.

A shop was closed by Sub-Inspector of Police and remained closed pending the criminal trial against the shop-keeper. Application was made to the Court to release the shop alleging the shop was in the possession of the Sub-Inspector, but consideration of such application was postponed till the disposal of the case with the consent of the applicant.

Held : that the applicant who subsequently brought a suit for malicious prosecution against the Sub-Inspector knew that the shop was under the control of the Court and he being lax in obtaining its release, the Sub-Inspector of Police who was found to have acted in good faith was not responsible for the loss caused by the shop being closed. (*Jackson, A.J.C.*) KARAN SINGH *v.* NANDKISHORE, **1929 Cr. C. 590= A.I.R. 1929 Nag. 334.**

—Innocence.

——*Burden of Proof of innocence.*

In a suit for malicious prosecution plaintiff should not be required to prove that he was innocent of the charge upon which he was tried. To throw the burden of proof on the plaintiff to prove that the charge brought by the defendant against him was false is tantamount to putting the plaintiff to the proof of his innocence without giving him the benefit of acquittal obtained by him in the criminal Court. The burden of proof shifts to the defendants that the charge disbelieved by the criminal Court was true : A.I.R. 1926 P. C. 46 and 25 Bom. 332, Rel. on. (*Dalal, J.*) KISHUN MAL *v.* SAKAL RAJ. **A.I.R. 1929 All. 818.**

MALICIOUS PROSECUTION—Malice.

The first thing that the plaintiff in a suit for damages for malicious prosecution has to prove is his innocence. Where the information to the Magistrate which led to proceedings under S. 107, Criminal P.C. being taken against the plaintiffs included more than one specific accusation.

Held : that the fact that one of these accusations had not been supported by evidence was no ground for giving the plaintiffs a decree for damages for malicious prosecution, when the case as a whole had not been found to have been laid without reasonable and probable cause. (*Ross, J.*) HARIHAR SINGH *v.* DASRATH AHIR. **85 I.C. 476=A.I.R. 1925 Pat. 469.**

—Malice.

——*Conspiracy to prosecute plaintiff—Suit against all defendants.*

In a suit for damages for malicious prosecution the finding was that all the three defendants conspired to prosecute the plaintiff maliciously and without reasonable and probable cause and that in furtherance of fheir design one of the defendants figured as the complainant in a cognizable offence of which information was lodged by him to the police and the latter prosecuted the plaintiff on the faith of such information. Evidence, in the case, was given by all the three.

Held : that under these circumstances, all the three defendants, including the police officer were rightly considered by the trial Court to have prosecuted the plaintiff so as to entitle the latter to sue them for compensation for malicious prosecution : 30 All. 525 (P.C.); A.I.R. 1926 P.C. 46, Rel. on. (*Sen and Niamatullah, JJ.*) MD. SHARIF *v.* NASIR ALI. **A.I.R. 1930 All. 742.**

——*False accusation to knowledge of prosecutor—Inference of malice—Malice means indirect or improper motive.*

Where the accusation is false and false to the knowledge of the prosecutor, absence of reasonable and probable cause is obvious. The inference of malice is likewise irresistible where the object of launching a false prosecution is to provide defence in a connected case in which the prosecutor is the accused. In this connection malice does not necessarily mean enmity or hatred but any indirect or improper motive. Prosecuting another person on a groundless charge for the purpose of stablishing false defence in another case is actionable. (*Niamatullah, J.*) BANSI *v.* HUKAM SINGH. **A. I. R. 1930 All. 216.**

——*Proof of—Engaging Counsel in Criminal Case.*

Where the police investigate a case and sends it up for trial, in the absence of proof that the informant intentionally gave false information, it cannot be said that he acted maliciously merely because he was told by some persons that the person complained of was innocent nor because the informant engaged a counsel in the criminal case. (*Brown, J.*) YE NAM LOW *v.* MAUNG PE-WUN. **117 I.C. 62= A.I.R. 1929 Rang. 63.**

——*Maliciously bringing a civil suit—Action may lie but not if the object is to defend one's own trade.*

MALICIOUS PROSECUTION—Malice.

Where damages are sought for the mere bringing and prosecution of a civil suit two main questions emerge. The first question is a question of the remoteness of the damage. The mere institution of the proceedings may, having regard to their character, involve damage to credit or reputation, damage to property in the sense that the defendant is put to expense, or damage to the person in the sense that he is liable to arrest. In such cases that damage is not remote but in any ordinary case the bringing of an ordinary action however maliciously and however great the want of reasonable and proper cause, will not support a subsequent action for malicious prosecution. Injury to plaintiff's business is not a ground for maintaining such a suit. The second question is as to what is meant by malice. There is some authority for the view that it is actionable for one person wilfully to injure a man in his trade if damage results to him, provided that if the real purpose is not to injure another, but to forward or defend one's own trade, then no wrong is committed and no action will lie, although damage to another ensues. In some cases malice is postulated as an element, meaning thereby that the act complained of is wilfully and knowingly done, or that it is done for the purpose of injuring another but not as connoting personal enmity or spite or some other evil motive. *Wren* v. *Weild* (1869) 4 Q. B. 730 and *Sorell* v. *Smith* (1925) A. C. 700, Foll. (*Rankin, C. J. and C. C. Ghose, J.*) IMPERIAL TOBACCO Co. *v.* ALBERT KONNAN. **106 I.C. 277=46 C.L.J. 455=A.I.R. 1928 Cal. 1.**

———*Proof of malice—Getting up false evidence.*

In a suit for malicious prosecution the fact that defendant lodged his complaint and got up false evidence in support of it, shows not merely that he had not sufficient and reasonable cause but that he was actuated by malice. (*Fawcett and Madgavkar, JJ.*) ALAMKHAN *v.* BANEMIYA. **95 I.C. 39=28 Bom. L.R. 459=A.I.R. 1926 Bom. 306.**

———*Prosecution* bona fide *in origin malicious subsequently.*

A prosecution need not be malicious from the very commencement of it. It may have been undertaken at the instance of a Judge or Magistrate or it may have been commenced under *bona fide* belief in the guilt of the accused. But it may subsequently become malicious in any of the stages through which it has to pass, if the prosecutor having known subsequently of the innocence of the accused perseveres *malo animo* in the prosecution with the intention of procuring a conviction of the accused. But in any case the foundation of an action for malicious prosecution is malice and this malice may exist at any time in the course of the enquiry. (*Kinkhede, A. J. C.*) VITHOBA *v.* MT. BHIMAI. **82 I.C. 1014=A.I.R. 1925 Nag. 216.**

———*Protecting one's own interest does not imply malice.*

The mere institution of a prosecution without reasonable and probable cause is not sufficient to justify a decree in a suit for malicious prosecution, if the defendant honestly believed that the accused (plaintiffs) had committed a criminal offence; it is further necessary to find that the prosecution was malicious.

To protect one's own interest is not necessarily malicious and is not incompatible with a real desire to serve the ends of justice. Where a prosecution is obviously false and not instituted in good faith, the Courts will infer malice but where a prosecution has been instituted under a *bona fide* belief that the accused has committed an offence, even though that belief is mistaken, the plaintiff's cannot obtain a decree unless the prosecution is malicious as well, even if inquiry would have shown that no offence had been committed. 1901 A. C. 495 Foll. (*Pratt, J.*) MAUNG SET KHAING *v.* MAUNG TUN NYEIN. **92 I.C. 512=4 Bur. L.J. 69=3 Rang. 82=A.I.R. 1925 Rang. 221.**

MALICIOUS PROSECUTION—Prosecution.

———*Anger and haste contra indicate malice.*

If there was an honest belief in the plaintiff's guilt neither anger nor hastiness on the part of the defendant would evidence malice, and anger so far from being a wrong or indirect motive is one of the motives on which the law relies to secure the prosecution of offenders, while hastiness in the defendant's conclusion as to the plaintiff's guilt although it might account for his coming to a wrong conclusion, does not show the presence of any indirect motive. (*Abdul Raoof and Campbell, JJ.*) ABDUL SHAKUR *v.* LIPTON AND CO. **72. I.C. 411=6 L.L.J. 1=A.I.R. 1924 Lah. 1.**

———*False allegations to the knowledge of the prosecutor indicate malice and advice of Counsel is no justification for the prosecution where true facts are not laid before Counsel.*

By an agreement between the parties plaintiff contracted with the defendant to take on lease a cinema which was to be constructed by the defendant. There was time limit for the building in the contract which was on four sheets of paper bearing a certain original date. The solicitor of both the parties added a fresh front sheet on a stamp paper each time the contract period was altered and it was signed and initialled by the parties. Owing to quarrels due to a desire to alter the contract in a particular way on the side of both parties, the defendant applied for prosecution of the plaintiff for cheating and forgery on the ground that the plaintiff took the new front sheet, attached to it the remaining back sheets of the original agreement and tried to have the documents so prepared registered. The result of this prosecution was acquittal in the Sessions. Plaintiff sued for damages for malicious prosecution, *held*, that as it was the intention of the parties that the new front sheet was to be a part of the document, the prosecution of the plaintiff was without reasonable and probable cause and was also malicious since the object of the defendant was to take undue advantage on account of a pending prosecution of the plaintiff. No doubt where true facts are laid fairly before the legal adviser and on his advice prosecution is started a party is ordinarily protected but not where facts are not fairly laid before the adviser. (*Schwabe, C. J., and Ramesam, J.*) W. H. NURSE *v.* RUSTOMJI DORABJI. **77 I.C. 787=19 M.L.W. 397=34 M.L.T. 25=1924 M.W.N. 382=A.I.R. 1924 Mad. 565=46 M.L.J. 353.**

—Where there was no reasonable and probable cause for instituting the prosecution, and malice could be inferred from the circumstances, plaintiff is entitled to damages. (*Macleod, C.J., and Fawcett, J.*) JAMNADAS SHIVRAM *v.* CHUNILAL HAMBIRMAL. **59 I.C. 520=45 Bom. 227=A.I.R. 1921 Bom. 144.**

—Measure of Damages.

The fact that criminal proceedings end without even the issue of a process against the accused person will be an element for consideration on the question of the measure of damages for malicious prosecution. (*Wazir Hasan and Gokarnath Misra, JJ.*) GUR SARAN DAS *v.* ISRAR HAIDAR. **105 I.C. 553=1 L.C. 492=A.I.R. 1927 Oudh 471.**

—Prosecution.

———*Application under Criminal P.C., S. 436 is prosecution.*

MALICIOUS PROSECUTION—Prosecution.

The word ' prosecution ' has a very wide significance and does not merely mean an actual trial or an enquiry which may result in a conviction and the imposition of imprisonment or fine. Therefore, an application in revision under S. 436, Criminal P.C., for ordering an enquiry or a retrial is a prosecution : 17 C. W. N. 554 ; 19 C.W.N. 935 ; 41 All. 503 and A.I.R 1922 Cal. 145, Rel. on. *(Sulaiman and Niamatullah, JJ.)* B. MADAN MOHAN SINGH *v.* B. RAM SUNDAR SINGH. **1930 A.L.J. 885 = A.I.R. 1930 All. 326.**

——*Correct information to police—Prosecution thereon—Defendant not liable.*

In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant ; if he misleads the police by bringing suborned witnesses to support it ; if he influences the police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution has not technically been conducted by him.

Therefore, it is impossible to hold that the defendant is liable for damages where there is not an iota of evidence to suggest that he ever went beyond giving a true information of the occurrence regarding a theft in his house and also a true statement of the fact that he suspected the plaintiff : 30 All. 525 (P.C.), *Foll. (Mukerji, J.)* NAGENDRA NATH *v.* BASANTA DAS. **57 Cal. 25 = A.I.R. 1930 Cal. 392.**

—Prosecution is not commenced till summons is issued *(obiter)*. *Yates* v. *Queen*, (1885) 14 Q.B.D. 648, Rel. on. *(Mukerji, J.)* NAGENDRA NATH *v.* BASANTA DAS. **57 Cal. 25 = A.I.R. 1930 Cal. 392.**

——*Proceedings before police are proceedings anterior to "Prosecution"—Semble.*

Semble—In the decision of the Judicial Committee in the case of *Balbhaddar Singh* v. *Badri Sah* (A.I.R. 1926 P.C. 46) there is sufficient to indicate that proceedings before the police are proceedings anterior to "prosecution." There is also enough in the decision of the Judicial Committee in the case of *Gaya Prasad* v. *Bhagat Singh* (30 All. 525) to indicate that police proceedings are distinct from a " prosecution " for the purpose of a suit for malicious prosecution. *(Mukerji, J.)* NAGENDRA NATH *v.* BASANTA DAS. **57 Cal. 25 = A.I.R. 1930 Cal. 392.**

——*Prosecution in the sense of the Criminal Procedure Code—No condition precedent.*

A suit for malicious prosecution is not a statutory suit and if the facts alleged disclose a cause of action, notwithstanding that the suit has been named or described as such, that cause must be tried. For there are certain wrongs akin to malicious prosecution which entitle the person aggrieved to sue, as for instance, malicious abuse of the process of the Court, malicious arrest, malicious search and malicious execution. These kindred suits are sometimes treated as being suits for malicious prosecution and this is the origin of the dictum " that the maintainability of a suit for malicious prosecution does not depend on there having been a prosecution in the sense in which that term is used in the Criminal Procedure Code."

MALICIOUS PROSECUTION—Prosecution.

The dictum is perfectly correct so long as it is meant to apply to these kindred suits : 38 Cal. 880, Rel. on. *(Mukerji, J.)* NAGENDRA NATH *v.* BASANTA DAS. **57 Cal. 25 = A.I.R. 1930 Cal. 392.**

——*Application under Sec.* 195, *Cr. P. C. is prosecution.*

The definition of 'prosecution' is not confined to prosecution before a Magistrate or a Criminal Court. If a Judicial Tribunal is moved which has the power to take criminal action against the person charged the requirement of the law is satisfied and a claim for damages for malicious prosecution will arise. The word "prosecution" includes such civil actions as may be the subject of a suit for malicious prosecution : (Case-law discussed.) A.I.R. 1922 Cal. 145, Rel. on. *(Suhrawardy and Garlick, JJ.)* RABINDRA NATH *v.* JOGENDRA CHANDRA. **114 I.C. 796 = 56 Cal. 432 = 48 C.L.J. 339 = 33 C.W.N. 79 = A.I.R. 1928 Cal. 691.**

—The institution of proceedings under S. 145, Criminal P. C., amounts to a malicious prosecution : 17 C.W.N. 55 ; 41 All. 503, Rel. on. *(Kendall, J.)* SUKH NANDAN SAROOP *v.* FAZAL HUSAIN. **100 I.C. 449 = A.I.R. 1927 All. 412.**

——*Giving information leading to prosecution is "prosecution."*

In any country, where, as in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the word, could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble is caused, an action will lie. *(Viscount Dunedin).* BALBHADDAR SINGH *v.* BADRI SAH. **95 I.C. 329 = 1 Luck. 215 = 24 A.L.J. 453 = 3 O.W.N. 499 = 28 Bom. L.R. 921 = 1926 M.W.N. 482 = 43 C.L.J. 521 = 30 C.W.N. 866 = 29 O.C. 163 = 7 P.L.T. 591 = 13 O.L.J. 749 = A.I.R. 1926 P.C. 46 = 51 M.L.J. 42 (P.C.)**

——*Prosecution does not start until process is issued.*

Defendant filed a complaint before the Presidency Magistrate, George town, Madras, charging the plaintiff with a criminal offence, *viz.*, criminal breach of trust. The Magistrate held an enquiry himself presumably under S. 202 of the Criminal P. C., after issuing notice to the plaintiff and giving him an opportunity to attend the enquiry. He did attend the enquiry and the result of it was that the Magistrate dismissed the charge.

Held : that in law there was no "prosecution" of the plaintiff by the defendant and as there was no prosecution in law the plaintiff's claim for damages for malicious prosecution must fail : A.I.R. 1926 Mad. 521 ; and 37 Mad. 181, Foll. *(Beasley, J.)* A. A. ARUNACHELLA MUDALIAR *v.* K. CHINNAMUNUSAMY. **97 I.C. 351 = 24 M.L.W. 22 = 1926 M.W.N. 527.**

——*Mere setting of law in motion, no test—Conduct considered.*

In a case for malicious prosecution the mere setting of law in motion is not the test to find out who the prosecutor really was. The conduct of the complainant before and after making the charge must be taken into account. Therefore if the complainant has not done anything beyond merely giving what he believed to be correct information to the police and if without further interference on his part the police have thought fit to prosecute, it is not proper to hold him liable in damages if the prosecution results in failure ; but if to the knowledge of the complainant the charge was false and if he misled the police by bringing

MALICIOUS PROSECUTION—Prosecution.
suborned witnesses to support it and if the police were influenced by him to send an innocent man for trial before a Magistrate it will not be proper to allow him to escape the liability to pay damages simply on the ground that the prosecution was technically not conducted by him. (*Kinkhede, A. J. C.*) VITHOBA *v.* BHIMAI. **82 I.C. 1014=A.I.R. 1925 Nag. 216.**

———*Active participation in prosecution started already.*

Where the deft. had taken a most active part in carrying on the prosecution against the plft. engaging a pleader at great expense to assist the Prosecuting Inspector and through the pleader conducting the examination and cross-examination of witnesses and where the prosecution would not have gone so far as it had done without him.

Held that though technically the prosecution had not been started by him yet he was liable as the real prosecutor. (30 All. 525 P. C. Foll.) (*Neave and Daniels, JJ.*) RADHA KISHAN *v.* KEDAR NATH.
80 I.C. 874=46 All. 815=22 A.L.J. 761=5 L.R.A. Civ. 536=A.I.R. 1924 All. 845.

—A suit for damages is maintainable against a person who supplied the information on which prosecution was launched though he may not have himself figured as the complanant in the Criminal Court. 42 Mad. 880, Foll. ; 26 Mad. 362, not Foll. (*Sadasiva Aiyar and Spencer, JJ.*) SHANMUGA UDAYAR *v.* KANDASWAMI ASARI. **59 I.C. 973=12 L.W. 170.**

———*Information to Police—Police prosecution on suspision—Informant not liable.*

Deft, in whose premises burglary was committed gave intimation to the police and the police on suspicion arrested plft, search his house, and found a great number of articles belonging to the deft. The deft, declared the articles were stolen from his premises and that the police may take such action as they thought admissible. *Held*, that deft, should not be said to have prosecuted the plff, or taken part in the conduct of the prosecution so as to render him liable for damages for malicious prosecution. The fact that he was examined as a witness for the prosecution is immaterial. 10 L.W. 235, Dist. (*Wallis, C.J. and Krishnan, J.*) RAJAGOPALA NAICK *v.* SPENCER AND CO., LTD. **59 I.C. 218=12 L.W. 87=28 M.L.T. 298.**

—" Prosecution"—Meaning of.

Complaint dismissed without issue of process—Mere institution of criminal proceedings is sufficient prosecution giving the accused a cause of action to sue for damages.

The word " prosecution" does not bear any technical meaning in this connexion but only its natural meaning, *viz.*, the institution of criminal proceedings : 30 All. 525 (P.C.) ; 20 C. L. J. 518 ; 28 Bom. 226 and FitzJohn v. Makinder (9 C. B. N. S. 505), Rel. on : 37 Mad. 181 ; 37 Cal. 358 ; and 38 Cal. 880 ; Expl. and Dis . from. (*Wazir Hasan and Gokaran Nath Misra, JJ.*) GUR SARAN DAS *v.* ISRAR HAIDAR.
105 I.C. 553=1 L.C. 492=A.I.R. 1927 Oudh. 471.

—Reasonable and probable cause.

———*Mixed question of law and fact.*

In malicious prosecution the existence of reasonable and probable cause is a question for the Judge and not for the jury. In India the balance of authorities is in favour of the view that the question is a mixed one of law and fact and the inference deducible from proved facts may be examined by the High Court on second appeal : 16 C. W. N. 540 ; 12 C. L. J. 410 and 28 Cal. 591, Ref. (*Mukerji, J.*) NAGENDRA NATH *v.* BASANTA DAS. **57 Cal. 25=A.I.R. 1930 Cal. 392.**

MALICIOUS PROSECUTION—Reasonable and probable cause.

The plaintiff, a servant of the defendant's neighbour, was earning Rs. 7 a month. About 14 years ago, he was imprisoned for six months on a conviction of theft. Thereafter, about 10 years ago, he stole some money by opening a trunk. He had the reputation of a " dagi " in the village. Quite recently there was an inquiry preliminary to the starting of a case under Criminal P.C., S. 110, in which proceedings the defendant had taken a prominent part. There was a theft in the defendant's house and the next day, in his information to the police, the defendant stated that he suspected the plaintiff in connexion with the theft. Upon this information the police arrested the plaintiff, kept him in hajat, and eventually, finding no evidence connecting him with theft, submitted a final report on which the plaintiff was discharged. The plaintiff brought a suit for malicious prosecution.

Held: that in view of all these facts it was exceedingly difficult to hold that there was want of reasonable and probable cause on the part of the defendant in suspecting the plaintiff and mentioning about this suspicion in the information of the occurrence that he lodged with the police. (*Case law considered.*) (*Mukerji, J.*) NAGENDRA NATH *v.* BASANTA DAS.
57 Cal. 25=A.I.R. 1930 Cal. 392.

———*Aequittal raises presumption of reasonable and probable cause.*

When a person comes to Court after acquittal in the criminal Court, he has not positively to prove his innocence but only want of reasonable and probable cause before he would be entitled to claim damages. The proof of a want of reasonable and probable cause is not tantamount to proof of innocence. When a person has been acquitted, there would be a presumption of want of reasonable and probable cause in an occurrence when there was no scope for surmise and the evidence was given by the defendant of what he actually saw : A.I.R. 1926 P. C. 46 Appl. (*Dalal, J.*) MAHOMAD DAUD KHAN *v.* JAI LAL.
116 I.C. 852=A.I.R. 1929 All. 265.

—A certain person made charges against another which were false to his knowledge. He was sued for malicious prosecution.

Held : that he had absolutely no reasonable and probable cause for bringing the charges and therefore was liable. (*Raza, J.*) GAJRAJ *v.* CHANDRIKA PRASAD. **114 I.C. 501=5 O.W.N. 1039.**

———*Complaint under S. 212, Madras Estates Land Act, gives no cause of action for damages.*

—A suit claiming damages for malicious prosecution in respect of a complaint of an offence under S. 212, Estates Land Act, in which it was alleged that the act amounted to robbery, will not lie, there being no scandal or damage to fair name therein. Plaintiff must prove want of probable and reasonable cause. The tenants cannot be held to be aware of the strictly legal rights of landlord : 31 M.L.J. 479, Foll. (*Phillips and Odgers, JJ.*) NAGANNA NAIDU *v.* VENKATARAYULU NAIDU. **117 I.C. 797=A.I.R. 1929 Mad. 286.**

———*Test.*

Even in cases in which personal element constitutes the essence of the offence there may be certain facts which may afford an answer to the prosecution and on determination of such facts, will depend the answer to the question as to whether there was or was not reasonable and probable cause for the prosecution : A. I. R. 1926, P. C. 46. Foll. (1889) A, W. N. 189 and 11 A.L.J. 125, not Foll. (*Wazir*

MALICIOUS PROSECUTION—Reasonable and probable cause.

Hasan, J.) SHIVARATAN *v.* RAM SAMRAN.
101 I.C. 274=2 Luck. 487=4 O.W.N. 270=A.I.R. 1928 Oudh 145.

———*Honest belief in accused's guilt is reasonable and probable cause.*

"Reasonable and probable cause" means "an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds of the existence of the state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed: *Hicks* v. *Faulkner*, (1882) 8 Q.B.D. 167, Foll. (*Wadegaonkar, A.J.C.*) BAPUJI *v.* KISAN.
89 I.C. 432=A.I.R. 1926 Nag. 175.

———*Plaintiff acquitted on appeal—Presumption is against absence of reasonable and probable cause.*

If the plaintiff has been convicted in the first instance and ultimately acquitted on appeal the presumption is against the absence of reasonable and probable cause unless the original conviction is proved to have proceeded on evidence known by the defendant to be false or on the wilful suppression by him of material facts: A. I. R. 1923 Patna 344; 21 All. 26 and 12 C. L. J. 410, Appr.

The defendant had impounded plaintiff's cattle, plaintiff was required to pay Rs. 14-14 to the pound-keeper to have his cattle released from the cattle-pound, and this amount was extorted from defendant by the plaintiff by wrongfully confining him. Plaintiff was thereupon convicted under S. 384, I. P. C., by the trial Court, but ultimately acquitted. Plaintiff then filed a suit for damages for malicious prosecution.

Held: that the prosecution was neither malicious nor was there absence of reasonable and probable cause. (*Wadegaonkar, A. J. C.*) BAPUJI *v.* KISAN.
89 I. C. 432=A. I. R. 1926 Nag. 175.

In an action for malicious prosecution the question whether the prosecution was instituted against the plaintiff without any reasonable or probable cause is a question of fact. 25 Bom. 332 and 28 Cal. 591, Foll. (*Dalal, Ag. J. C.*) MAHADEO PRASAD *v.* CHUNNILAL. **86 I. C. 596=12 O. L. J. 88=2 O. W. N. 62=28 O. C. 387=A. I. R. 1925 Oudh 359.**

———*Meaning.*

Reasonable and probable cause means on honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. (*Abdul Raoof and Campbell, JJ.*) ABDUL SHAKUR *v.* LIPTON & Co. **72 I. C. 411=6 L. L. J. 1=A.I.R. 1924 Lah. 1.**

—In execution of a decree, the officer of the Court went to judgment-debtor's house and attached some articles. The judgment-debtor thereupon filed a complaint of theft against the decree-holder which was found to be groundless. In a suit for malicious prosecution by decree-holder against judgment-debtor, *held* where on the face of it, the charge brought by defendant against plaintiff is groundless, it can safely be inferred that the defendant had no reasonable and probable cause and the plaintiff cannot be asked to give further evidence directly going to show that there was no reasonable and probable cause. (*Rafique, J.*)

MALICIOUS PROSECUTION—Suit for.

BISHUN SARUP *v.* BINDRABAN. **73 I. C. 446=A. I. R 1923 All. 531.**

———*Acquittal in appeal—Presumption is against the absence of reasonable and probable cause.*

The true rule is that if the plaintiff has been convicted in the first instance and ultimately acquitted on appeal the presumption is against the absence of reasonable and probable cause unless the original conviction is proved to have proceeded on evidence known by the defendant to be false or on the wilful suppression by him of material information. (*Das and Kulwant Sahay, JJ.*) JAGNARAIN DUBEYEY *v.* BIDAPET DUBEY. **72 I. C. 409=4 P. L. T. 202=1 P. L. R. 332=A.I. R. 1923 Pat. 344.**

———*Test.*

The determination of the issue as to the absence of existence of a 'reasonable and probable cause' depends entirely on the circumstances of each case. The only possible rule to guide is 'that there must have existed a state of circumstances upon which a reasonable and discreet person would have acted. The rule prescribes not a standard of absolute rectitude and certainty but of reasonableness and probability in relation to a defendant's mind. The question whether or not a reasonable man would or would not act upon the information given by another must depend in a great degree upon the opinion to be formed of the position and circumstances of the informant, and the amount of credit which may be due under those circumstances to the person who thus conveyed the information. In an action for a malicious prosecution where a person is proved to have acted upon the information of a trustworthy informant he cannot be said to have proceeded without reasonable and probable cause because he had not made inquiry of some one else who could have repeated and confirmed what was told him. The defendant's persistence in persuing the accusation by filing the petition for revision would certainly be evidence of malice, but it is no evidence of the absence of reasonable and probable cause. (*Wazir Hasan, A. J. C.*) KAZIM HUSAIN *v.* BASIT HUSAIN. **61 I. C. 970=8 O. L. J. 147=A. I. R. 1921 Oudh 1.**

—Suit for

A suit for malicious prosecution is not a statutory suit and if the facts alleged disclose a cause of action notwithstanding that the suit has been named or described as such, that must be tried. For there are certain wrongs akin to malicious prosecution which entitle the person aggrieved to sue, as for instance, malicious abuse of the process of the Court, malicious arrest, malicious search and malicious execution. These kindred suits are somtimes treated as being suits for malicious prosecution and this is the origin of the dictum "that the maintainability of a suit for malicious prosecution in the sense in which that term is used in the Criminal Procedure Code." The dictum is perfectly correct so long as it is meant to apply to these kindred suits: 38 Cal. 880, Rel. on. (*Muker ji, J.*) NAGENDRA NATH *v.* BASANT DAS. **57 Cal. 25=A. I. R. 1930 Cal. 392.**

—No action to claim damages for malicious prosecution can lie until there has been acquittal in the first Court. (*Viscount Dunedin*). OSUMANYAWA YAW EWNA *v.* NANA SIR OFORI ATTA.
A.I.R. 1930 P.C. 260. (P.C.)

———A suit for malicious prosecution can lie in respect of proceedings under S. 107 of the Criminal P. C. 17 A. L. J. R. 776 and 17 C. W. N. 554, Foll.; 13 M. L. J. 370, Not Foll. (*Tudball and Rafique, JJ.*) CHIRANJI SINGH *v.* DHARMSINGH. **19 A.L.J. 191=43 All. 402=A.I.R. 1921 All. 173.**

MALICIOUS PROSECUTION—Suit for--Essentials.
—Suit for—Essentials.

It is not necessary, in order to succeed in an action for malicious prosecution, for the plaintiff to prove that he has suffered any special pecuniary loss through the conduct of the defendant. The unwarranted charge brought against him of criminal misconduct must of itself injure his reputation ; it might lead to an arrest for which he would be entitled to further compensation. (*Wazir Hasan and Gokaran Nath Misra, JJ.*) GUR SARAN DAS *v.* ISRAR HAIDAR.
105 I.C. 553=1 L.C. 492=A.I.R. 1927 Oudh 471.

MALIKHANA.

See (1) C. P. CODE, S. 60.
(2) HINDU LAW—MAINTENANCE.
(3) T. P. ACT, S. 6.

MAMLATDAR.

See BOMBAY MAMLATDAR COURTS ACT.

MANAGER.

See HINDU LAW—JOINT FAMILY ETC.

MANDAMUS.

See SPECIFIC RELIEF ACT, S. 45.

MANDATORY INJUNCTION.

See SPECIFIC RELIEF ACT, S. 55.

MAPS.

See EVIDENCE ACT, SS. 35, 74 AND 83.

MARAKAYAR.

See (1) HINDU LAW.
(2) MAHOMEDAN LAW.

MARITIME JURISDICTION.

See (1) LETTERS PATENT.
(2) SHIPPING.

MARRIAGE.

See (1) EVIDENCE ACT, SS. 112, 114.
(2) HINDU LAW—MARRIAGE.
(3) MAHOMEDAN LAW—MARRIAGE.
(4) RESTITUTION OF CONJUGAL RIGHTS.

MARRIED WOMEN'S PROPERTY ACT (III of 1874.)
—S. 6—Amended by S. 2 of Act XIII of 1923—Applicability.

S. 2, Act XIII of 1923, declared that the provisions of S. 6 of the Act of 1874 shall apply in the case of any policy effected by any Hindu in Madras after the 31st December 1923. It does not further enact that they shall not apply to policies effected before that. They are therefore clearly governed by the old Act. 37 Mad. 483 (F. B.), Ref. (*Venkatasubba Rao and Madhavan Nair, JJ.*) RAMA RAO *v.* KRISHNAMMA. **121 I.C. 496=52 Mad. 936=30 M.L.W. 500=1929 M.W.N. 784=A.I.R. 1929 Mad. 825=57 M.L.J. 793.**

———*Policy effected in* 1910—*Hindu widow claiming as a nominee—Widow was held not entitled as the Act did not apply.*

A Hindu assured directed an Insurance Company to pay money due under his policy effected in 1910 to his wife as the nominee of the assured. The wife claimed the amount on the death of the assured contending that Women's Property Act applied and under S. 6 of the Act a trust had been created in her favour.

Held : that the wife was not entitled to the money as the Women's Property Act did not apply and there was no trust in her favour by virtue of S. 6. (*Rankin, C. J. and C. C. Ghose, J.*) KRISHNA LAL *v.* PROMILA BALA DASI. **114 I. C. 658=55 Cal. 1315=47 C. L. J. 587=32 C. W. N. 634=A. I. R. 1928 Cal. 518.**

MARSHALLING.

See T. P. ACT, SS. 81 AND 82.

MARTIAL LAW.
—Jurisdiction.

Per Kumaraswami Sastri, J.—A summary court appointed under the Martial Law Ordinance has no jurisdiction to try offences committed outside the Martial Law area, nor can it hold its court outside the area. (*Spencer and Kumaraswami Sastri, JJ.*) KOCHUNNI ELAYA NAIR. *In Re.* **68 I.C. 26=45 Mad. 14=23 Cr. L. J. 490=14 M. L. W. 465=1921 M. W. N. 708=A. I. R. 1922 Mad. 215=41 M. L. J. 441.**

MARTIAL LAW (FURTHER EXTENSION) ORDINANCE (IV of 1919.)
—Trial under.

The trial of an accused for an offence connected with the disturbances in the Punjab in March, April, 1919, under an Order of the Lieutenant-Governor by summary procedure of Martial Law was held not vitiated by want of jurisdiction. 1 Lah. 326 (P. C.) Foll. (*Viscount Cave*). KALINATH ROY *v.* EMPEROR. **59 I.C. 641==2 Lah. 34=48 I. A. 96=19 A. L. J. 65=23 Bom. L. R. 709=33 C.L.J. 124=25 C.W.N. 701=13 M. L. W. 253=1921 M. W. N. 49=10 P. W. R. 1921 (Cr.)=29 M. L. T. 142=22 Cr. L. J. 129=A. I..R. 1921 P. C. 29=40 M. L. J. 101 (P.C.)**

MARTIAL LAW ORDINANCE (II of 1921.)
—S. 6—Jurisdiction.

———*Decision of Court outside Martial Law Area—High Court can interfere.*

There is no right at all to hold a summary Court except in the Martial Law area and the jurisdiction of such a Court is local. Outside the area the ordinary rules of law prevail and there is nothing in the Ordinance to prevent the High Court interfering with the decision of any Court outside that area purporting to exercise a criminal jurisdiction which it does not possess. 45 Mad. 14, Foll. (*Schwabe, C. J., Oldfield and Coutts-Trotter. JJ.*) GOVINDAN NAIR *v.* EMPEROR. **68 I. C. 838=45 Mad. 922=16 M. L. W. 349=31 M. L. T. 304=23 Cr. L. J. 614=A. I. R. 1922 Mad. 499=43 M. L. J. 396 (F. B.)**

MASTER AND SERVANT *See also* TORT.

Contract of Service.
Crown Servants.
Dismissal from Service.
Master's Liability.
Offence by Servant.
Reasonable Notice.
Resignation by Servant.
Servant's Liability.
Tort by Servant.
Miscellaneous.

—Contract of Service.

———*No Specific clause* re: *place of Service—Liability for transfer at Master's Orders.*

Where from the nature of the contract entered into between a Bank and its servants it is difficult to assume that the Bank would willingly agree that their employees should not be bound to serve outside the place where the contract was made except with their consent such a condition of the contract would require to be clearly established. And in the absence of such proof an order of transfer is a lawful order which the servant is bound to obey and his disobedience can be justifiably treated by the Bank as *faute grave* making the servant liable for dismissal. There must be an immediately threatening danger by violence or disease to the person of the servant before an order to remain in the zone of danger can be held to be unlawful and can be disobeyed : *Anderson* v. *Moon*, (1837) 15 Shaw 412 and *Turner* v. *Mason*, (1845) 14 M. & W. 112, Ref. (*Lord Thankerton.*) ALEXANDRE BOUZOURON *v.* THE OTTOMAN BANK,

MASTER AND SERVANT—Contract of Service.

31 M.L.W. 702=A.I.R. 1930 P.C. 118 (P.C.)

———*Annual increments—Provision for—Service is terminable by reasonable notice.*

Even where a person is employed upon a remuneration which is a starting basis, and even where there is an agreement for an increase by annual increments up to a certain sum, there is certainly no obligation or implied condition that a servant would be allowed to remain long enough to earn maximum salary and also there is no intention, unless it were definitely expressed on the part of the contracting parties, that each year or the beginning of each year of service should be regarded as a new contract of employment. The proper way of regarding a contract of this kind is that it is one subject to reasonable notice on either side. (*Costello, J.*) BIMALACHARAN *v.* TRUSTEES, INDIAN MUSEUM. **57 Cal. 231=A.I.R. 1930 Cal. 404.**

———*Cessation of work—Relationship not determined.*

The mere proclamation of a strike does not terminate the relationship of master and servant and make the servant lose his character as a servant. There may of course be additional circumstances consequent on a strike which may determine that relationship. Cessation of work does not necessarily mean termination of the relationship as master and servant: *Lyons and Sons* v. *Wilkins*, (1896) 1 Ch. 811, Foll.: A.I.R. 1927 Pat. 377, Dist. (*Cuming and Mukerji, JJ.*) E. I. RY. CO. *v.* SHEWBUN ROY GHANSHYAMDAS. **112 I.C. 303=48 C.L.J. 37=32 C.W.N. 805=A.I.R 1928 Cal. 491.**

———*Service terminated before stipulated period—Servant can sue for damages.*

Where the services of a servant are terminated before the stipulated period, it is open to him to sue for damages for breach on the part of the master to keep him in service so as to enable him to earn his wages. But, before he succeeds he must prove that he himself was ready and willing and able to perform his part of the contract.

In the case of service terminable at a month's notice the stipulated period of service extends only to such date on which notice given in that behalf would expire; and when it is certain that the illness or incapacity of the servant will extend to the whole of the period of notice, the failure of the master to give the requisite notice is not sufficient to entitle the servant to claim damages: (English cases, Dist.) (*Rupchand Bilaram and Lobo, A. J. Cs.*) BURMA OIL CO. *v.* NARAINDAS DAYAL SINGH. **104 I.C. 185=A.I.R. 1927 Sind 253.**

———*Circumstances under which servant is justified in leaving service before end of contracted period—Physical violence is not necessary but some reasonable excuse is necessary and the onus of proof is on the servant.*

A servant is not justified in abandoning his contract before the expiration of the term unless good and just causes exist therefor. Generally speaking any breach of the express or implied provisions of the contract of employment by the master or any act or neglect on his part which is prejudicial to the safety, health, morals or reputation of the servant will be deemed a sufficient ground for abandonment. The duties which an employer owes to his employee depend upon the character of the employment. It is one of the implied stipulations of a contract of service that the employer will not, by any act of commission or omission, add or suffer to be added to the employment new conditions involving obligations, dangers or inconveniences which were not incident to it and were not within the contemplation of the employee when he was engaged. Any reduction of the rank or a material change in the duties of an employee is, from this point of view, regarded as a violation of the contract of employment, and the servant may thereupon consider the contract as having been violated by the master. The Court is to judge of the reasonableness of the excuse, in view of the circumstances, the language and the conduct of the master, the frequency of the cause, the provocation, if any, for the language or conduct, and its effect upon the servant and in all cases, the age of the servant is a matter of material importance, as what might be regarded as a very good excuse in the case of a young person, might be regarded as no excuse at all on the part of a person of mature years. To attempt to enumerate all the instances which would justify in quitting the service before his term is ended would be impossible. In all cases where the facts are not admitted, the question of reasonableness is one of fact and the servant takes the burden of establishing a reasonable excuse in all cases. The relation of master and servant while it thus implies obedience, submission and respect on the part of the latter, implies on the part of the former, the duty of protection and the gentleness and moderation in his bearing towards his servant. Refusal to provide suitable work may be a reasonable excuse justifying the servant in quitting the service. It is well established that an obligation on the part of the master to provide employment may be good consideration for his servant's promise of service. Whether or not such obligation exists, depends upon the circumstances of the individual case before the Court; but it may be implied, for instance, where the opportunity of acting in the capacity indicated in the contract of service is of primary importance to the person employed. Whatever divergence of judicial opinion may be discoverable from the decisions on the subject, it is clear that where the refusal by the master to find the work for the servant indicates reduction of rank or material change of duties, the employee is entitled to treat this as a violation of the contract of employment, justifying his quitting the same. (*Mookerjee and Chotzner, JJ.*) L.W. MIDDLETON *v.* HARRY PLAY FAIR. **86 I.C. 310=A.I.R. 1925 Cal. 87.**

———Agreement that master may impose fine—Suit for refund of fine is not barred. (*Ross, J.*) THE B. N. RY. CO. *v.* SUKHDEO PRASAD. **81 I.C. 739=6 P.L.T. 762=3 P.L.R. (Civ.) 84=A.I.R. 1925 Pat. 487.**

———If no custom or stipulation as to notice exists, and if the contract of service is not one which can be regarded as a yearly hiring, the service is terminable by reasonable notice. (*Mookerjee, Ag. C. J. and Fletcher, J.*) KAMINI KUMAR *v.* REBATI RAMAN DAS. **60 I.C. 756=33 C.L.J. 336=A.I.R. 1921 Cal. 346.**

———Any agreement among several servants that the service performed by one of them should be treated as service performed by all cannot be binding on the master. (*Sadasiva Aiyar and Spencer, JJ.*) KRISHNA AIYANGAR *v.* RAMAN CHETTIAR. **69 I.C. 469=14 M.L.W. 329=A.I.R. 1921 Mad. 670.**

—Crown Servants.

———*Government servant entering private employment without permission—Dismissal for misconduct—Government has no right to a refund of leave allowance paid before dismissal.*

The Secretary of State for India used the defendant, a public servant employed under the Government of Madras, for recovery of all leave allowances

MASTER AND SERVANT—Dismissal from service.

paid to the latter during the time he was employed in private service, contrary to the prohibition contained in R. 69 of the Fundamental Rules (C.S.R.) for which misconduct he was finally dismissed by the Government.

Held : that under R. 52 of the Fundamental Rules, a public servant is entitled to have his pay and allowances paid till the date of his dismissal and, therefore, the plaintiff's claim was not sustainable. (*Waller, J.*) RAMA NARAYANA SARMA *v.* SECRETARY OF STATE.

101 I.C. 23=25 M.L.W 394= A.I.R. 1927 Mad. 460=52 M.L.J. 285.

—Dismissal from service.

———*Refusal on reasonable grounds to serve at one place—Dismissal not justified.*

A Bank engaged a servant to serve in Turkey or any other place where the Bank had its business. The servant was condemned to death sentence by Turkish Government in 1919. The servant was posted in Constantinople in 1922. He unsuccessfully applied for transfer and being in fear of his life he left Constantinople without permission. He was dismissed and he sued for damages for wrongful dismissal.

Held : that the order to remain in Constantinople was not a lawful order and that at the time the disability of the servant from being able to reside in Constantinople could not be regarded as a permanent one and the offer of service outside Turkey is sufficient to entitle him to pursue the present suit, and the Bank is equally unable to found on that disability a justification for the dismissal. The risk to the servant was such that he was not bound to obey the order to remain in Constantinople which order, therefore, was not a lawful one : *Horlick* v. *Beale* (1916) 2 A.C., 486 and *Mason* v. *Turner*, (1845) 14 M. & W. 112, Ref. (*Lord Thankerton.*) OTTOMAN BANK *v.* ETIENNE CHAKARIAN.

31 M.L.W. 707= A.I.R. 1930 P.C. 110. (P.C.)

———If a servant cannot perform his duty for which he is employed, whether on account of age or otherwise, he is not entitled to any notice for termination of his service. (*Percival, J. C. and Rupchand, A. J. C.*) DETARAM *v.* FORBES.

117 I.C. 778= A.I.R. 1930 Sind 17.

—There is no fixed rule of law defining the degree of misconduct which will justify dismissal from service. Much will depend on the nature of the misconduct and the nature of the duties to be performed by the person dismissed : *Clouston & Co.* v. *Corry*, (1906) A. C. 122, Foll. (*Lobo, A. J. C.*) ABRAHAM REUBEN, *v.* KARACHI MUNICIPALITY.

113 I.C. 387= A.I.R. 1929 Sind 6).

———*Servant's misconduct if incompatible with faithful discharge of master's services justifies dismissal.*

There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Therefore one must have regard to the agreement forming the basis of the contract of employment and consider the surrounding circumstances, and if the misconduct is inconsistent with the express or implied conditions of service or incompatible with the due and faithful discharge of the servant's duty to his master, the dismissal will be justified. (*Sanderson, C. J. and Rankin, J.*) GUS. ALEXANDER A. MACKENZIE *v.* HIMALAYA ASSURANCE CO. LTD.,

94 I.C. 381= 30 C.W.N. 440=A.I.R.1926 Cal. 745.

———*Incompetency justifies dismissal.*

A servant was employed under a company as superintendent of a certain estate, the main products being tea and timber. The servant knew nothing about timber and the company incurred losses on account of his incompetency and he was dismissed.

Held : that the servant having been proved to be incompetent for the duties of the office the company could dispense with his services and that the servant was not entitled to recover damages for wrongful dismissal by the company. (*Venkatasubba Rao, J.*) MALABAR FOREST and RUBBER CO. *v.* MACLEOD.

91 I.C. 615=22 M.L.W. 675=A.I.R. 1926 Mad. 270.

———*Facts must justify dismissal.*

A Judge has to determine whether there was justification for the order of dismissal and not whether he personally would have dismissed the servant for such conduct. When an offence has been condoned or dealt with and the offender retained in service, it is not open to the employer to subsequently dismiss him for that same offence but if the servant offends again, it is perfectly justifiable for the employer to consider the prior offences in determining in what manner he should be dealt with for the subsequent offences. (*Phillips, J.*) MADURA DEVASTHANAM *v,* SUNDARAM ANNAVI.

91 I.C. 525=1925 M.W.N. 603= A.I.R. 1926 Mad. 57=49 M.L.J. 516.

—When a servant, whose wages are due periodically, so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid any wages for that portion of time during which he has served since the last payment of wages. (*Sulaiman, J.*) BHAKTA SHIROMANI *v,* SEETAL NATH.

88 I.C. 1018=48 All. 31=23 A.L.J. 682= 6 L.R.A. Civ. 529=A.I.R. 1925 All. 680.

———*Effect of condonation.*

If a master on discovering that his servant has been guilty of misconduct which would justify a dismissal, yet elects to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned. (*Mukerjee and Chotzner, JJ.*) L. W. MIDDLETON *v.* HARRY PLAYFAIR.

86 I.C. 310=A.I.R. 1925 Cal. 87.

———*Incompetency or neglect justifies dismissal before term.*

If the master discovers in the course of the employment that his servant is either incompetent and therefore cannot perform his duty, or does not or will not perform and thus neglects to discharge his duty with that degree of skill and tact of management which is ordinarily expected of a servant skilled in the branch for which he is employed, it ought to be a sufficient justification to support a dismissal of the servant without notice even before the end of the term. The failure to afford the requisite skill which had been expressly or impliedly promised is a breach of legal duty and therefore misconduct. There is no difference in principle between a dismissal for incompetency or for negligence or misconduct. Where a skilled labourer, artizan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes. (Case-law reviewed). (*Kinkhede, A. J. C.*) PANDURANG *v.* JAIRAMDAS.

82 I.C. 721= 21 N.L.R. 93=A.I.R. 1925 Nag. 166.

—Where a schoolmaster committed dereliction of duty and failed to obey a reasonable direction of the Managing Committee of the school,

Held that the dissmissal of the schoolmaster from service was justified. (*Jwala Prasad and Adami JJ.*) NIROD CHANDRA ROY *v.* KIRTYA NANDA SINGH.

80 I. C. 308=A. I. R. 1922 Pat. 24.

—A dismissed servant is not entitled to claim wages. In case the dismissal is wrongful, his remedy is by action for damages. (*Maungkin, J.*) DAVID *v.*

MASTER AND SERVANT—Dismissal from service.

SUPERINTENDENT, ST. ANTHONY'S HIGH SCHOOL.
63 I.C. 982=13 Bur. L. T. 168.

———*Master entitled under contract to dismiss servant if he (master) considered servant unsuitable—Servant cannot question the reasons for master's thinking him unsuitable but can challenge his* bona fides.

Where the contract of service provided that plaintiff might be removed if the Directors of the Company considered him unsuitable,

Held, that the plaintiff cannot call upon the defendants for a statement of particulars of the reasons why the Directors considered the plaintiff unsuitable, or adduce evidence to show that these reasons were wrong or insufficient and cannot ask the Court to substitute itself for the Directors to decide how far these reasons were good, bad or indifferent. All that he can ask the Court in cases of this character is whether the action of the defendant was an honest and *bona fide* exercise of their powers under the agreement. The *onus* of proof is on the plaintiff. (English cases referred.) (*Madgavkar, A. J. C.*) L. COLLINS *v.* CHARLES BOOTHAM & CO. LTD. **80 I. C. 958= 17 S.L.R. 9=A.I.R. 1921 Sind 106.**

—Master's Liability.

———*Temporary lending of servant—Liability of temporary master.*

Where one person lends a servant to another for particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent although he remains the general servant of the person who lent him: *Rourke* v. *White Moss Colliery Co.*, (1877) 2 C. P. D. 205 and *Donovan* v. *Laing, Wharton* and *Down Construction Syndicate*, (1893) 1 Q. B. 629, Rel. on. (*Rangnekar, J.*) KONDIVA GOPAL *v.* MESKREJEAN. **109 I. C. 191=30 Bom. L. R. 162= A.I.R. 1928 Bom. 91.**

—A servant has no implied authority to engage a stranger to do work on behalf of his master, so as to render the master liable for the stranger's acts or defaults except perhaps in a case of necessity, which term comprises only well known exceptional cases: (Case law discussed). (*Mukerji J.*) INDRA MOHAN ROI *v.* EMPEROR. **110 I. C. 326=47 C. L. J. 460= 10 A.I. Cr. R. 414=29 Cr. L. J. 694= A.I.R. 1928 Cal. 410.**

———*Servant temporarily lent — Liability of temporary master.*

When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him.

Plaintiff let out a lighter to the defendant. Part of the agreement was that the lighter should be manned by two lighter-boys, that is coloured labourers. The coloured labourers were, from the moment of the transfer, out of control of the plaintiff. While the lighter was lying in the harbour for the night both of the labourers decamped; and they had forsaken the duties which they were bound to perform. The consequence was that the barge having parted her moorings drifted with the current out of the harbour and subsequently ran ashore and broke.

Held: that the plaintiff had entrusted for the period of the hiring the control of their chattel to the defendants. During the entire period of hiring, the barge had to be watched over by the bailee and it was the bilee's duties to keep an eye upon the labourers or to furnish others so that the chattel might not be lost and therefore the defendants were liable for the loss. (*Lord Shaw.*) A. H. BULL & CO. *v.* WEST AFRICAN SHIPPING CO. **104 I. C. 113=4 O. W. N. 737= 47 C. L. J. 258=A.I.R. 1927 P. C. 173. (P.C.)**

MASTER AND SERVANT—Offence by servant.

———*Act done in the course of service—Master is bound.*

A servant can bind his master by an act committed in course of his service, and for his master's benefit, even though no express command or privity of the master can be proved, when the master has put him in his place to do that class of acts: *Barwick* v. *English Joint Stock Bank*, (1867) L. R. 2 *Exch.* 259 and A.I.R. 1923 Cal. 157, Rel. on. (*Duckworth, J.*) R. M. K. S. FIRM *v.* MAUNG BA GYAW. **99 I.C. 748= 5 Bur. L.J. 171=A.I.R. 1927 Rang. 44.**

—Offence by Servant.

———*Criminal liability for servant's acts.*

Where a particular intent or state of mind is not of the essence of an offence a master can be criminally liable for his servant's acts if an act is expressly prohibited but not otherwise and he cannot be so made liable if the Act provides for liability for permitting and causing a certain thing unless it can be shown that the act was done with the master's knowledge and assent express and implied. (*Greaves and Duval, JJ.*) YARAJ LALL *v.* EMPEROR. **82 I.C. 137=51 Cal. 948= 28 C.W.N. 854=25 Cr. L.J. 1209= A.I.R. 1924 Cal. 985.**

———*Offence facilitated by master's negligence—Liability.*

Where the true character of the criminal act of a servant is that it is an act of his own, deliberately done of his own choice and done to effect a purpose of his own, the master is not liable. If, however, the criminal act is facilitated by the negligence of the master, the master is liable and the liability in such cases rests on the master not really because his servant had committed the criminal act, but because he himself has been negligent. *Joseph Rank Ltd.* v. *Craig*, (1919) 88 L.J. Ch. 45, Foll.; (*Case-law discussed*). (*Cuming and Mukerji, JJ.*) E. I. RY CO, *v.* SHEWBUN ROY GHANSHYAMDAS. **112 I.C. 303= 48 C.L.J. 37=32 C.W.N. 805=A.I.R. 1928 Cal. 491.**

———*Servant presenting forged bill—Act is within scope of his authority.*

A man who does a thing through an agent does it himself in the eyes of the law. Where plaintiff and defendant had dealings together and defendant was in the habit of paying plaintiff's servants and on presentation of a forged bill by plaintiff's servant under the apparent authority of his master the defendant paid. *Held*, the presentation of the forged bill was just as much the act of the principal as a genuine bill, and the payment was a good payment, *Burwick* v. *English Joint Stock Bank* (1867) 2 Ex. 259, Foll. (*Walsh and Ashworth, JJ.*) PARTAP NARAIN *v.* JUTE MILLS. **103 I.C. 382=25 A.L.J. 724=A.I.R. 1927 All. 653.**

———*Loss of master's money by servant—Liability—Conditions.*

Where a person, a paid servant of the plaintiff, was sent to a Bank to pay in his master's money and he returned saying that he kept the money on the counter and lost it:

Held: that in the absence of proof that the money had been stolen from him, he not having taken due care and caution of his master's money, was guilty of negligence and was liable to repay it in an action for money had and received, (*Marten, J.*) ABDULLA SHARIFF *v.* MD. ABAN. **98 I.C. 367= 28 Bom. L.R.500=A.I.R. 1926 Bom. 320.**

MASTER AND SERVANT—Reasonable notice.

—Reasonable notice.

The question of what is reasonable notice is a question of fact, and depends largely upon the circumstances of each particular case: Beeston *v.* Collier (1827) 4 Bing. 309 Dist. (*Costello, J.*) BIMALACHARAN *v.* TRUSTEES, INDIAN MUSEUM.

57 Cal. 231=A.I.R. 1930 Cal. 404.

———*Clerk on monthly Salary*—

Per *Rupchand, A. J. C.*—There is no rule of law to the effect that a clerk employed on a monthly salary who is not household servant or menial is entitled to three months' notice or three months' pay in lieu of notice. All that the law requires is that he should be given a reasonable notice and what is reasonable notice depends on the particular facts of each case. (*Percival, J. C. and Rupchand, A. J. C.*) DELARAM *v.* FORBES. **117 I.C. 778= A.I.R. 1930 Sind 17.**

———*School Teacher—Services dispensed with—Notice.*

A person was provisionally appointed as teacher by the Secretary of a School. At the next meeting of the Committee, it recognized him as one of the staff but owing to financial stringency it decided to dispense with his services from August:

Held: that the person was entitled to reasonable notice or three months' pay in lieu thereof under the circumstances:

Held further: that the Secretary would not be personally liable to pay the compensation, for the case was not covered by S. 235, Contract Act. (*Duval, J.*) BHUPENDRA MAHAN *v.* JATINDRA CHANDRA. **113 I.C. 571=43 C.L.J. 191= A.I.R. 1929 Cal. 289.**

——Servant can be dismissed on reasonable notice—Reasonableness is question of fact. (*Lobo, A.J.C.*) ABRAHAM REUBEN *v.* KARACHI MUNICIPALITY. **113 I.C. 387=A.I.R. 1929 Sind 69.**

———In the case of service terminable at a month's notice the stipulated period of service extends only to such date on which notice given in that behalf would expire; and when it is certain that the illness or incapacity of the servant will extend to the whole of the period of notice, the failure of the master to give the requisite notice is not sufficient to entitle the servant to claim damages: (English cases Dist.) (*Rupchand Bilaram and Lobo, A. J. C's.*) BURMA OIL CO. *v.* NARAINDAS DAYALSINGH. **104 I.C. 183= A.I.R. 1927 Sind 253.**

———The ordinary rule of law is that in the absence of any express agreement or established custom to the contrary the contract of service is terminable by reasonable notice. A servant paid by the month is not entitled to one month's notice. (*Moti Sagar, J.*) GANGA RAM *v.* DUNI CHAND BHANDARI. **78 I.C. 763=A.I.R. 1925 Lah. 136.**

—The rule of one month's notice which applies to menials, will not apply to the case of a school master. The rule as to yearly hiring extends to domestic and other servants such as clerks and others, but it is not an inflexible rule and each case must be considered by itself, and in each case it must be decided what notice would be reasonable. (1858) (3 Exhibit 151) distinguished (14 Cal. 917) followed. (*Jwala Prasad and Adami, JJ.*) NIROD CHANDRA ROY *v.* KIRTYA NANDA SINGH. **80 I.C. 303=A.I.R. 1922 Pat. 24.**

———There is no authority for holding that a monthly servant is entitled to a month's notice. In the absence of agreement or custom the contract of service is terminable by reasonable notice. (*Maung Kin, J.*) DAVID *v.* SUPERINTENDENT, ST. ANTHONY'S HIGH SCHOOL. **63 I.C. 982=13 Bur. L.T. 168.**

—Resignation by servant.

———*Test to determine voluntary or compulsory resignation.*

In determining whether a person has resigned or has been compelled to resign the correct test is to find whether the acts and conduct of the servant evince an intention no longer to be bound by the contract, or whether the conduct of the employer amounts to a basic refusal to continue the servant on the agreed terms of the employment; in the latter case there is a wrongful dismissal and repudiation of the contract and the use of polite instead of peremptory language would not alter the conclusion: *Stephenson v. London Joint Stock Bank, Ltd.*, 20 T.L.R. 9; *General Bill Posting Co. v. Atkinson*, (1909) A. C. 118; In re *Rubel Bronze and Metal Co.* & Vos., (1918) 1 K, B. 315, Rel. on. (*Lobo, A.J.C.*) ABRAHAM REUBEN *v.* KARACHI MUNICIPALITY. **113 I.C. 387=A.I.R. 1929 Sind. 69.**

———*Office—Resignation ends connection on acceptance.*

Resignation of an office ends the incumbent's connection with it on acceptance.

Quaere:—Does resignation of an Honorary Magistracy or other honorary office take effect before acceptance?

It may be that the need for acceptance does not apply to honorary appointments and it is a question of fact in each case whether the resignation amounts to renunciation without acceptance and may depend to a certain extent on the contents of the letter of resignation. (*Ramesam, J.*) SUDARSANA RAO *v.* J. A. CHRISTIAN PALLAI. **76 I.C. 813= 33 M.L.T. 215=A.I.R. 1924 Mad. 396= 45 M.L.J. 798.**

—Servant's liability

—If a servant leaves his employment without notice, he cannot draw wages for that portion of time for which he has served since the last periodical payment of wages. But the servant is not liable to be mulcted in damages for the loss caused to his master by his leaving his employ without notice. (*Pratt, J.*) MAUNG AUNG THA *v.* MAUNG BA THAN. **88 I.C. 612= 4 Bur.L.J. 72=A.I.R. 1925 Rang. 243.**

—Tort by Servant.

Where the malicious prosecution is the result of the instigation of master by the servant, the master is held liable for the damages. (*Newbould and Panton, JJ.*), BISHAN SINGH *v.* RAMBABAL ROY. **64 I.C. 741 (Cal.)**

—Miscellaneous.

———*Dismissal of servant—Suit for damages—Measure of damages.*

Every master has an inherent right to dispense with the services of his servant with reasonable notice. As to what is reasonable notice depends on the nature, of the servant's employment. When this is determined, the measure of damages is what the servant would have earned in the employment of his master during the period of notice. The damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment: *Maw* v. *Jones*, (1890) 25 Q. B.D. 107, deemed overruled by *Addis. v. Gramaphone Co.*, (1909) A. C. 488, Foll. (*Lobo, A. J. C.*) ABRAHAM REUBEN *v.* KARACHI MUNICIPALITY. **113 I. C. 337= A.I.R. 1929 Sind 69.**

MASTER AND SERVANT—Miscellaneous.

———*Workman's Breach of Contract Act* (*XIII of* 1859).

A provision by which the advance to the workman is to be repaid by periodical deductions from the amount of his wages and should in any case be worked out by him does not simply create a relation of debtor and creditor but does create relation of master and servant. 13 Bom, L.R. 548 and 1 Weir 681 Dist. (*Oldfield and Hughes, JJ.*) SOMMANNA *v.* CHELLAPATHI RAO. **60 I.C. 52=44 Mad. 53=22 Cr. L.J. 196=A.I.R. 1921 Mad. 618.**

MATERIAL ALTERATION.

See (1) DEED—MATERIAL ALTERATION.
(2) NEG. INS. ACT, S. 87.

MATERIAL IRREGULARITY.

See CIV. PRO. CODE, S. 115.

MATRIMONIAL DOMICILE.

See DOMICILE.

MATRIMONIAL JURISDICTION.

See (1) DIVORCE ACT.
(2) RESTITUTION OF CONJUGAL RIGHTS.

MAXIMS.

———*Actio personalis moritur cum persona—Maxim does not apply to proceedings in respect of non-cognizable offences.*

In a case of non-cognizable offence instituted upon a complaint the axiom of *actio personalis moritur cum persona* in civil law confined to torts does not apply and the trying Magistrate has discretion in proper cases to allow the complaint to continue by a proper and fit complaint if the latter is willing: 20 Cal. W. N. 862, Appl. (*Marten and Madgavkar, JJ.*) MAHOMED AZAM *v.* EMPEROR. **93 I.C. 891=28 Bom. L.R. 288=27 Cr. L.J. 491=A.I.R. 1926 Bom. 178.**

—Where the plaintiff sues to recover damages for malicious prosecution and for obstructing plaintiff's right of way over the defendant's land, and the defendant dies during the pendency of the suit, the suit abates, and, apart from the statutory exceptions which may exist, the only cases, in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to be those in which property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys. (*Saunders, J. C.*) MA SHWE THIT *v.* MAUNG PO AUNG. **65 I.C. 66=4 U.B.R. 73=A.I.R. 1922 U.B. 7.**

———*Actus curiae neminem gravabit—Non-compliance due to party's delay—Maxim does not apply.*

To apply the maxim that an act of Court should not prejudice any party, it must be possible to hold that the failure to comply with the rule of law was due to the action of the Court and not to any default of the party. 13 C.L.J. 467; 37 All. 591; 21 Mad. 385; 52 I. C. 161, Ref. (*Krishnan, J.*) KRISHNAJI *v.* MUTHUVEERA. **72 I.C. 449=18 M.L.W. 299=1923 M.W.N. 199=A.I.R. 1923 Mad. 490=44 M.L.J. 344.**

———*Cessat Ratio Cessat Lex.*

A law does not cease to be operative because it is out of keeping with the times. A law does not become obsolete because it is an anachronism or because it is antiquated or because the reason why it originally became the law would be no reason for the introduction of such a law at the present time. To hold the contrary would be an entire misunderstanding of the meaning of the legal maxim *cessat ratio cessat lex.* (*Schwabe, C. J., Oldfield and Coutts-Trotter, JJ.*) PUDIAVA NADAN *v.* PAVANASA NADAN. **69 I.C. 313=**

MAXIMS

45 Mad. 943=16 M.L.W. 563=1922 M.W.N. 693=31 M.L.T. 320=A.I.R. 1923 Mad. 215 (F.B.)=43 M.L.J. 596.

———*'Certum est quod certum reddi postest'—applicability.*

Where the performance of an agreement to sell was made conditional on certain other events and a suit was filed for specific performance on fulfilment of one of the conditions. *Held* that the maxm "*certum est quod certum reddi postest*" did not apply. (*Tek Chand and Agha Haidar, JJ.*) LAKHA SINGH *v.* GHULAM MUHAMMAD. **31 P.L.R. 636.**

———*De Minimis non Curat Lex.*

Where, under the rules of a trust, it was prescribed that a certain proportion of the trustees shall be necessary for the passing of a valid resolution,

Held, the doctrine "De Minimis non curat lex" cannot be applied in the calculation of the number of trustees. (*Marten, C.J. and Kemp, J.*) LAKHIDAS AND CO. *v.* DORAB TATA. **101 I.C. 229=51 Bom. 247=29 Bom. L.R. 19=A.I.R. 1927 Bom. 195.**

———*Ejusdem generis.*

Every word ought *prima facie* to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context.

The rule of construction which is called the *ejusdem generis* doctrine or sometimes *noseitur socus* is one, which ought to be applied with great caution because it implies a departure from the natural meaning of words in order to give them a meaning which may or may not have been the intention of the legislature; *Attorney-General* v. *Merces*: (1883) 8 App. Cas. 778 and other English cases Ref. (*Gregory, J.*) A. B. MITCHELL *v.* J. C. DUTT. **109 I.C. 739=55 Cal. 173=32 C.W.N. 264=A.I.R. 1928 Cal. 209.**

———"*Expressio unius est exclusio alterius*".

The maxim "*expressio unius est exclusio alterius*" is not of general applicability and can only be applied with great caution and more so when interpreting two different sections of a statute providing for different contingencies. This maxim is often a valuable servant but a dangerous master to follow in the construction of statutes and documents. (*Rupchand Bilaram, A, J. C.*) Re: NARAINDAS SUNDERDAS. **93 I.C. 331=20 S.L.R. 197=A.I.R. 1926 Sind 133.**

———*Statutes partial and limited—Maxim is not applicable—Interpretation of statutes.*

The maxim *Expressio unius exclusio alterius* cannot be applied in the case of statutes enacted imperfectly or for particular purposes. The failure to make an *expressio* complete may easily arise from the accidents of legislative procedure and it is common to find provisions put into statutes *ex-abundanti cautelo* and at the instance of parties interested. The only inference which the Court can draw from such superfluous provisions is that the legislature was either ignorant or unmindful of the real state of the law or that it acted out of excessive caution. (*Mookerjee and Rankin, JJ.*) KRISHNA KAMINI DASI *v.* NILMADHAB SAHA. **73 I.C. 312=36 C.L.J. 382=A.I.R. 1923 Cal. 66.**

———*Falsa demonstratio non nocet—Deed with map annexed to it—Map inaccurate—Map can be disregarded.*

No doubt a map annexed to a deed is a part of the contract and as a rule must be used as evidence of the parcels, but an inaccurate map does not affect or vitiate a clear description of the parcel, although under certain circumstances a map or survey may override a description of parcel. If further the parcel of land be loosely described in deed and map is inaccurate, but

the boundaries demarcated on the land by cairns of stones which have been in perfect accordance with the agreement, map if inaccurate is a *falsa demonstratio* and boundary marked on land is conclusive : *Lyle* v. *Richards*, (1866) 35 L. J. Q. B. 214 Foll. (*Kemp , Ag. C. J. and Murphy, J.*) ABDUL RAHMAN v. SECRETARY OF STATE. **31 Bom. L.R. 1433= A.I.R. 1930 Bom. 125.**

———*Falsus in uno, falsus in omnibus.*

Maxim should not be literally applied. It is for the Court to sift the evidence and to separate the chaff from the grain, if it is possible to do so and to show what portion of it is true and what portion false, and whether the true portion should be relied upon or not. (*Maung Kin, J.*) MAUNG PO. GYON v. MAUNG SO. **70 I.C. 902=1 Bur. L.J. 213= A.I.R. 1923 Rang. 30.**

———*Generalia Specialibus non-derogant.*

A general provision relating to meetings and the formalities to be served in connection therewith does not become inapplicabie *in toto* to a particular meeting mentioned in another section, simply because some of the language of the general section is not appropriate to a meeting of the latter description. (*Mirza and Broomfield, JJ.*) PANDURANG NARAIN v. RAMCHANDRA. **38 Bom. L. R. 1252.**

———*Ignorance of law is no excuse.*

Ignorance of the law is ordinarily very much of an excuse as it leads to a reduction of the sentence though it may not be ground for an acquittal. (*Hallifax, A. J. C.*) SITARAM KUNBI v. EMPEROR. **109 I.C. 234=24 N.L.R. 110=11 N.L.J. 46= 10 A.I.Cr.R. 215=29 Cr. L.J. 506= A.I.R. 1928 Nag. 188.**

———*In pari delicto.*

When both parties are *in pari delicto* the maxim *in pari delicto potior est conditio possidentis* applies and the court will not assist plaintiff to recover in such cases. (*Phillips and Devadoss, JJ.*) JANU SAIT v. RAMASWAMI NAIDU. **72 I.C. 735= 18 M.L.W. 564=1923 M.W.N. 335= 32 M.L.T. 330=A.I.R. 1923 Mad. 626.**

Where the purpose of a *benami* transaction is fraudulent, and has gone beyond the stage of mere intention, the maxim will apply and a party to the transaction cannot avoid it. (*Mittra, Offg. A. J. C.*) ISMAIL v. WASUDEO. **59 I.C. 285=16 N.L.R. 129.**

———*In pari delicto potior est conditio possidentis.*

A purchased a house benami in the name of *B* to defeat his creditors, *B* being aware of the fraud, and executed a bogus rent note in *B's* name. *B* sued *A* for rent.

Held : that *B* being a party to the fraud the maxim *in pari delicto potior est conditio possidentis* would apply. (*Findlay, J. C.*) LALCHAND v. BAHADUR. **99 I.C. 780=A.I.R. 1927 Nag. 365.**

Where under a deed of exchange the plaintiff and defendant exchanged their plots held by them as tenants-at-will and the plaintiff sued to eject defendant on the ground that the exchange was void,

Held, that though the exchange is void, the plaintiff who was also a party to it cannot be given the relief asked for. (*Wazir Hasan, A. J. C.*) BISHESHWAR v. RACHCHA RAM. **61 I.C. 985=8 O.L.J. 200= A.I.R. 1921 Oudh 132.**

———"*Nemo allegans suam turpitudinem*".

Where *A* transfers his property to *B* in fraud of creditors, and where the fraud has been accomplished, and *B* afterwards sues for possession, *held B* could not succeed and that the maxim *Nemo allegans suam turpitudinem audiendus est* gives way to the maxim *in pari delicto potior est conditio possidentis*. (*Mookerjee and Chotzner, JJ.*) RAGHUPATI CHATTERJEE v. NIRSHINGHA HORI DAS. **71 I.C. 1= 36 C.L.J. 491=A.I.R. 1923 Cal. 90.**

———*Nemo allegans turpitudinem suam est audiendus—Gift—Death of donee — Donor can't plead gift was fictitious.*

Father made a gift in favour of his minor son. During the donee's lifetime the donor did or said nothing to suggest that the gift was fictitious. On the contrary, all his acts and statements tended to show that he intended to make a real gift. But when the minor donee died, it became convenient to the donor to ignore the gift and to claim that he remained all along owner of the estate and that the gift was meant only to enable the Court of Wards to take charge of the property. He also got a deed of relinquishment executed by the widow of the donee in his favour reciting that the gift in her husband's favour was fictitious.

Held : that the maxim *nemo allegans turpitudinem suam est audiendus* would be applicable, and the donor or his representatives cannot be allowed to take advantage of his own wrong doing and deny that the gift was fictitious. (*King, J.*) KRISHNAPAL SINGH v. SRI RAJ KAUR. **104 I.C. 299= 1 L.C. 97=A.I.R. 1927 Oudh 278.**

———*Nemo debet bis Vexari.*

A witness made two conflicting statements in a trial before a Sessions Judge who made a complaint to the District Magistrate stating that the second of the two statements was false; the Magistrate framed a charge in respect of the second statement only and convicted the accused : On appeal which was heard by the same Sessions Judge, re-trial was ordered.

Held : that the accused is entitled to a decision from a Judge who approaches his case with an open mind ; and that the proceedings should be quashed on the ground that the complainant and the Appellate Court were one and the same and it would not be illegal but most inadvisable to submit the accused to a fresh trial because of the initial mistake of the Court in not framing the charge in the alternative and the principle of *nemo debet bis vexari* applies in the spirit if not in the letter. (*Harrison, J.*) SAI v. EMPEROR. **106 I.C. 342=8 Lah. 496= 28 P.L.R. 688=29 Cr.L.J. 6= A.I.R. 1927 Lah. 671.**

———"*No one can convey a better title than he himself has*".

One who owns property subject to a charge can in general convey no title higher or more free than his own and it lies always on such succeeding owner to make out a case to defeat such a prior charge. (*Abdul Raoof and Harrison, JJ.*) KHANSHI RAM v. ISWARDAS. **67 I.C. 888=5 L.L.J. 150= A.I.R. 1923 Lah. 108.**

———*Nunc pro tunc.*

Doctrine of giving retrospective effect to act of persons who performed it after proper time, is confined to those whose failure would result in hardship without their fault. (*Shadi Lal, C. J., Broadway and Tekchand, JJ.*) SHAMDAS v. UMAR DIN. **A.I.R. 1930 Lah. 497 (F.B.)**

MAXIMS.

———"*Omnia praesumuntur rite et solemniter esse acta donee probetur in contrarium*".

Where there is evidence on both sides as to the factum of attestation and that evidence is evenly balanced, resort may be had to the maxim "*omnia praesumuntur rite et solemniter esse acta donee probetur in contrarium*". . . It also operates when there is no evidence on either side and it is also possible that it may be used to eke out unconvincing testimony on one side. (*Findlay, J. C.*) JANARDHAN *v.* GANPAT, **96 I.C. 543=A.I.R. 1926 Nag. 471.**

———Omnia rite actor—*Compromise decree—Sanction of court on behalf of minor—Presumption.*

In giving sanction to a compromise decree on behalf of a minor the Court may be presumed to have taken the minors' interest into accounts. (*Rankin, C. J. and C. C. Ghose, J.*) SUDHIRENDRA DEB MANNA *v.* RANENDRA DEB MANNA. **51 C.L.J. 364.**

———*Quando aliquid etc.*

The general principle of all grants "quando aliquid conceditur idetiam conceditur sine quo res ipsa non esse potest" is always true as between grantor and grantee, but it does not necessarily apply as against third parties. (*Lord Dunedin*). SATYA NIRANJAN *v.* RAM LAL. **86 I.C. 289=29 C.W.N. 725=27 Bom.L.R. 753=23 A.L.J. 712=6 P.L.T. 42=21 M.L.W. 289=4 Pat. 244=52 I A. 109=A.I.R. 1925 P. C. 42=48 M L.J. 328.**

———*Quicquid plantatur (or aedificatur) solo, solo cedit.*

Maxim does apply in India unless there is custom to the contrary. There is no custom of Hindu (or other) law by which the maxim *quicquid plantatur* (*oraedificatur*) *solo, solo cedit* does not apply in India. The English law would apply unless it is clear that by local, customary or other law applicable in this country, it does not. The Courts of India have not excluded the application of the maxim altogether, though they have held and the legislature has said in effect that there are substantial exceptions to the application of the maxim. (*Otter, J.*) N. P. A. CHETTIAR FIRM *v.* H.C. SHARMA. **110 I.C. 133=6 Rang. 87=A.I.R. 1928 Rang. 145.**

———*Application limited.*

The maxim which is found in English law, *viz.* "*quicquid plantatur solo, solo cedit*", has at the most only a limited application in India. There is nothing in the laws or Customs of India, to show any traces of the existence of any absolute Rule of Law that whatever is affixed or built on the soil becomes a part of it and is subjected to the same rights of property as the soil itself. (*Sir Lancelot Sanderson*). NARAYAN DAS *v.* JATINDRA NATH. **102 I.C. 198=54 Cal. 669=1927 M.W.N. 459=54 I.A. 218=29 Bom. L.R. 1143=46 C.L.J. 1=31 C.W.N. 965=8 P.L.T. 663=26 A.L.J. 1=26 M.L.W. 848=A.I.R. 1927 (P.C.) 135=53 M.L.J. 135.**

———*Quod fieri non debt factum valet.*

Where the appellant in a seeond appeal whose election as president had been set aside by the trial Court, had failed to implead in the first appeal the District Local Board who in accordance with the decree of the trial Court had held fresh elections, appointed a new President and been carrying on its proceedings under the new constitution, he has put it out of the power of the Court of the second appeal to grant him any relief. The High Court will not, in such a case, give him a decree which would be in effect an abuse of process of Court, calculated to upset what has already been validly done. (*Mirza and Broomfield, JJ*). PANDURANG NARAIN *v.* RAMACHANDRA. **32 Bom. L. R. 1252.**

MEETINGS—Quorum.

———*Utresmagis Valent quam pereat.*

Deeds—Construction. In construing an instrument of settlement carrying out a decision of the Court, Courts ought to take for their guidance the rule that, if possible, such a docu ment should be construed *ut res magis valeat quam pereat*. (*Phillimore,*) LAL RAM SINGH *v.* THE DEPUTY COMMISSIONER OF PARTABGARH. **76 I.C. 922=1923 M.W.N. 591=45 All. 596=50 I.A. 265=26 O.C. 257=21 A.L.J. 777=33 M.L.T. 355=10 O.L.J. 513=29 C.W.N. 86=A.I.R. 1923 P.C. 160=47 M.L.J. 260.**

———*Volenti non fit injuria.*

To succeed under the maxim, it is necessary for the defendant to prove that the person injured knew of the danger, appreciated it, and voluntarily took the risk. That he had some knowledge of the danger is not sufficient. (*Sehwabe, C.J. and Wallace, J.*) S. I. INDUSTRIALS, LTD. *v.* ALAMELU. **72 I.C. 632=1923 M.W.N. 344=17 M.L.W 495=A.I.R. 1923 Mad. 565=45 M.L.J. 53.**

MEASURE OF DAMAGES.

See DAMAGES.

MEDICAL CERTIFICATE.

See EVIDENCE ACT, S. 74.

MEDICAL DEGREES ACT (VII of 1916) —S. 6—Offence Under.

———*Addition of initials like M.D.B. or L.M.H. is no offence.*

Styling oneself M.D.B. *i. e.*, Doctor of Bio-Chemic Medicines or L.M.H. *i.e.*, Licentiate of Homœopathic Medicines does not by itself constitute an offence.

Query: Whether assumption of a title "Doctor" is an offence under Section 6. (*Kennedy, J.C. and Raymond, A.J.C.*) ATAL RAI KISHENCHAND *v.* EMPEROR. **81 I.C. 197=17 S.L.R. 344=25 Cr. L.J. 709=A.I.R 1925 Sind 71.**

MEDICAL EVIDENCE.

See (1) EVIDENCE.
(2) EVIDENCE ACT, S. 73.

MEETINGS.

—Adjournment.

———*Adjournment of meeting for want of* quorum *without notice is invalid:*

Where there is no *quorum*, the assembled members have no power to adjourn the meeting unless at any rate notice of the adjournment is given to all the members. If no notice of the adjournment is given to all the members the adjourned meeting held afterwards is invalid. There being no special rule, the case must be decided on general principles. The mere fact that the notice states that some very important matters were to be transacted does not give one an express notice that appointments of new trustee of the suit Temple were to be made and is not sufficient. With certain very limited exceptions where a special meeting of a Committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of the meeting and its purposes. (*Marten and Fawcett, JJ.*) NILKANTH DEORAO *v.* MURARI GOVIND. **73 I.C. 178=25 Bom. L.R. 315=A.I.R 1923 Bom. 272.**

—Interpretation.

A distinction is drawn between acts done by "the Commissioners" and acts done by "the Commissioners at a meeting". (*Suhrawardy and Graham, JJ.*) CHAIRMAN, HOWRAH MUNICIPALITY *v.* RAMSARUP SEROUGEE. **95 I.C. 726=A.I.R. 1926 Cal. 1073.**

—Quorum.

———*Persons present but not voting cannot be regarded as absent.*

Persons who are present at a meeting in fact but who do not take active part in the proceedings or vote,

MELBOURNE AND METROPOLITAN BOARD OF WORKS ACT (1915) S. 94—Exemption.

cannot be regarded as absent for the purpose of a quorum. (*Cuming and Chakravarti, JJ.*) DWARKANATH DUTTA *v.* CHANDRA MOHAN ROY. **91 I.C. 642= A.I.R. 1926 Cal.665.**

MELBOURNE AND METROPOLITAN BOARD OF WORKS ACT (1915).

—S. 94—Exemption.

———*Exemption is restricted to municipal institutions.*

Section 94 as it stands discloses an intention on the part of the legislature to restrict the exemption from water rates to public institution, *i.e.*, municipally owned or conducted institutions. (*Chief Justice Anglin*). L. ARTHUR ADAMSON *v.* MELBOURNE AND METROPOLITAN BOARD OF WORKS. **115 I.C. 740= 30 M.L.W. 147=A.I.R. 1929 P.C. 181. (P.C.)**

MEMORANDUM OF OBJECTIONS.

See C. P. CODE, O. 41, R. 22.

MENS REA.

See TORT.

MENTAL STATE.

See PENAL CODE.

MERCANTILE CONTRACT.

See CONTRACT ACT.

MERCHANDISE MARKS ACT (IV of 1889).

—S. 15—Offence.

———*"Offence" means the offence charged—Time of the original infringement is immaterial.*

The offence specified in S. 15 is the particular offence charged and it makes no difference whether the original infringement took place two or five or ten years ago. The words "first discovery" mean when the complainant first discovered the offence and he is to take action within one year from that time. (*Chotzner and Gregory, JJ.*) AKHOY KUMAR *v.* EMPEROR. **114 I.C. 131=30 Cr. L.J. 252= 12 A.I.Cr. R. 136=32 C.W.N. 699= A.I.R. 1928 Cal. 495.**

MERCHANT SHIPPING ACT (XXI of 1923).

—S. 103 (4)—Essence.

The essence of S. 103 (4) is assault. (*Rankin and Chotzner, JJ.*) ALFRED LAIRD *v.* EMPEROR. **99 I.C. 1033=31 C.W.N. 195=28 Cr. L.J. 233= 7 A.I. Cr. R. 386=A.I.R. 1927 Cal. 224.**

—S. 103 (4)—Trial under.

———*Conviction under Calcutta Police Act, S. 68—Trial under Merchants Shipping Act, S. 103 (4) on the same facts is barred.*

Where the accused, an officer of a steamship, was convicted under S. 68 of the Calcutta Police Act on a charge of drinking and disorderly conduct creating a disturbance by assaulting the Captain of the vessel and sentenced to pay a fine, and the Captain subsequently filed a complaint on the same facts under S. 103 (4) of the Merchants Shipping Act charging the accused with having assaulted him and he was convicted under the said section and sentenced.

Held: that the substantial charge under the Police Act being "assault" Criminal P. C. S. 403 (1), 2nd part, is a bar to a second conviction upon the same facts under a different enactment, namely, the Merchants Shipping Act. (*Rankin and Chotzner, JJ*). ALFRED LAIRD *v.* EMPEROR. **99 I.C. 1033= 31 C.W.N. 195=28 Cr. L.J, 233= 7 A.I. Cr. R. 386=A.I.R. 1927 Cal. 224.**

MERGER.

See (1) C. P. CODE, O. 34. R. 3 (3).
(2) LANDLORD AND TENANT.
(3) T. P. ACT, S. 101.

MESNE PROFITS.

See also (1) C. P. CODE, S. 2 (12), O. 20, R. 12.
(2) HINDU LAW—(*a*) ALIENATION.
,, (*b*) PARTITION.
(3) PARTITION.

—Ascertainment of.

An application for ascertainment of mesne profits being an application in the suit itself is not governed by any provision of the Limitation Act: 19 Cal. 132 (F. B.); A.I.R. 1926 Pat. 141, Foll. (*Das and James, JJ.*) KAMAKHAYA NARAYAN *v.* AKLOO SINGH. **117 I.C. 647=8 Pat. 482=10 P.L.T. 762= A.I.R. 1929 Pat. 368.**

Question of mesne profits cannot be settled in an application for delivery of the land and the crop standing on it. (*Spencer, J.*) DODDA BASAPPA *v.* PUDDI ERUPPA. **97 I.C. 567= A.I.R. 1927 Mad. 71.**

———*Defendant in possession of land letting out on cash rent.*

On application for ascertainment of mesne profits.

Held: on the consideration of circumstances, mesne profits should be assessed on the produce basis. Although the defendant was letting out on cash rents, what the defendant might with ordinary diligence have received from the land, must be considered. (*Chatterjee and Page, JJ.*) SECRETARY OF STATE FOR INDIA *v.* PURNA CHANDRA MUKHERJEE. **99 I.C. 923=44 C.L.J. 559 (Cal.)**

———*Principle of assessment—Whether lease money or actual cultivating profits are payable depends on character of possession at date of ouster —Expenses are allowed to trespasser if he entered under* bona fide *claim of right.*

Where the person dispossessed by a trespasser is himself, ordinarily, a cultivator of the land in dispute, the profits to which he is entitled or those that the wrongful holder might have obtained by actual cultivation with due diligence. It is not open to a trespasser to dispossess and actually cultivate and then to sub-let the land trespassed upon to some third person, and claim to compensate the rightful occupant only to the extent of what he may have obtained by the sub-letting. (35 Cal. 1000, Foll.)

Ordinarily, in calculating the amount of profits, payment made by the defendants for rent, revenue or cesses must be deducted, but the Court should not allow to the defendants the expenses of collecting the profits, unless they entered on the property in the exercise of a *bona fide* claim of right. (24 All. 376, Foll.) (*Kinkhede, A. J. C.*) UMASHANKAR *v.* PANDIT RAMLAL. **83 I.C. 738=20 N.L.R. 112= A.I.R. 1924 Nag. 427.**

———Application for ascertainment of mesne profits —Court passing decree is proper Court though amount exceeds pecuniary jurisdiction. (*Das and Ross, JJ.*) SURAJ PRASAD PANDE *v.* SOMRA MAHTO. **68 I.C. 903=2 P.L.T. 648= A.I.R. 1921 Pat. 430.**

—Claim for.

There is no reason why the claim for mesne profits should not be gone into in further proceedings after the decree, although an application is not made for that purpose. (*Chatterjee and Cuming, JJ.*) NRIPENDRA NATH BHOWMIK *v.* BASANT KUMAR LAHIRI. **89 I.C. 207=29 C.W.N. 861= A.I.R. 1925 Cal. 1195.**

———Lease by widow—Suit by adopted son for possession—Mesne profits can be allowed only from date of suit. (*Macleod, C. J. and Crump, J.*) GANPATI SHANKARAPPA *v.* KRISHNAPPA SHIVRAM. **73 I.C. 204=A.I.R. 1924 Bom. 159.**

———Where the plaint does not say from what date mesne profits are claimed, presumably plaintiff claims

MESNE PROFITS—Decree for.

mesne profits only from the date of institution of the suit. (*Brown, A. J. C.*) MOUNG LU GALE *v.* MAUNG LU PO. **77 I.C. 53=4 U.B.R. 140=1 Bur. L.J. 267=A.I.R. 1923 Rang. 110.**

—Decree for.

Where a decree is passed for mesne profits, on an application for the assessment of the profits, it is not open to the defendant to raise a question of his liability to pay the profits. (*Chatterjea and Page, JJ.*) SECRETARY OF STATE FOR INDIA *v.* PURNA CHANDRA MUKHERJEE. **99 I.C. 923=44 C.L.J. 559 (Cal.).**

———Decree for period before suit — Court cannot in application to determine it, award mesne profits, after decree date—Court should grant full mesne profits found though claim is for less. (*Kanhaiya Lal, J.C.*) KUPER SINGH *v.* MT. RAJ KUNWAR. **68 I.C. 896=25 O. C. 132=10 O.L.J. 56=A. I. R. 1922 Oudh 197.**

—Evidence.

Commissioner appointed to ascertain mesne profits—He cannot take evidence as to possession and the Court cannot act upon such evidence. (*Das and Ross, JJ.*) MT. SARASWATI BAHURIA *v.* SURAJ NARAIN. **109 I.C. 641=9 P.L.T. 258=A.I.R. 1928 Pat. 278.**

—Liability for.

Different parties in possession of different items—Each of them is liable for such profits only for the item in his possession. (*Srinivasa Aiyangar and Ananthakrishna Ayyar, JJ.*) KUNHI KURUMBAN *v.* LAKSHMI. **111 I. C. 378=A.I.R. 1928 Mad. 387.**

———*Mortgage by tenant—Auction-purchaser under mortgage decree in possession after tenancy ceases—Mortgagor is not liable for mesne profits.*

It is not correct to say that an act, however remotely connected with the trespass, makes a person responsible for damages. A party who has been active in wrongfully keeping another out of the possession and enjoyment of property is liable for consequential damages, whether he derived any profit himself from the possession of the land or not; but a mortgagor is not liable for the wrongful possession of the auction-purchaser in execution of the mortgage decree. (*Mitter, A. J. C.*) MT. SONI *v.* MEGHASHYAM. **18 N.L.R. 195=A.I.R. 1923 Nag. 103.**

———Mesne profits ought not to be estimated for any period during which the defendant, who is to be made responsible for them, was not active in keeping the plaintiff out of possession. The liability for mesne profits depends not upon the purchase by defendant but upon the entry upon the land. 21 W. R. 29, Foll. (*Das and Ross, JJ.*) DAMODAR NARAIN CHOUDHRY *v.* S. A. MILLER. **61 I.C. 754=2 P.L.T. 563=6 P.L.J. 166=1921 P.H.C.C. 294=A.I.R. 1921 Pat. 102.**

—Limitation.

A suit by an administrator of an intestate person against an executor *de son tort* is governed by Art. 123 and the latter is liable to account for mesne profits for a period of 12 years before suit: A.I.R. 1926 Mad. 681; A.I.R. 1922 Mad. 457 (F. B.); A.I.R. 1925 P. C. 105; A.I R. 1916 P. C. 145 (P.C.) and 43 Bom. 845, Rel. on. (*Fforde and Tek Chand, JJ.*) HARRY PERCIVAL ROBSON *v.* ADMINISTRATOR-GENERAL, PUNJAB. **30 P.L.R. 503=A.I.R. 1929 Lah. 753.**

———Mesne profits can be claimed only against the person who is in actual possession and limitation for its recovery is three years from the date when the cause of action for its recovery arises. (*Abdul Raoof and Abdul Qadir, JJ.*) RAGHO *v.* DWARKA DAS. **79 I. C. 68[illegible] P. W. R. 1923=A. I. R. 1924 Lah. 738.**

MESNE PROFITS—Measure of.

—Measure of.

———*Test to be applied in calculating mesne profits is what prudent agriculturist would have grown.*

The test set by the statutory definition of mesne profits is clearly not what a person has lost by his exclusion, but what the trespasser has or might reasonably have made by his wrongful possession. What the person in such a case might or would have made can only be relevant as evidence of what the trespasser might with reasonable diligence have received. The true test in calculating mesne profits is what the ordinary prudent agriculturist would have grown. (*Sir George Lowndes.*) HARRY KEMPSON GRAY *v.* BHAGU MIAN. **121 I. C. 540=1930 A. L. J. 128=34 C.W.N. 257=7 O. W. N. 303=31 M. L. W. 425=32 Bom. L. R. 525=57 I. A. 105=9 Pat. 621=1930 M. W. N. 580=A. I. R. 1930 P. C. 82=58 M. L. J. 215. (P.C.).**

———The amount of mesne profits for the years prior to the filing of the plaint would represent the amount of mesne profits for the years after the suit also, in the absence of any special circumstances. (*Anantakrishna Ayyar, J.*) PONNUSWAMI GOUNDAN *v.* KALYANASUNDARA AYYAR. **A.I.R. 1930 Mad. 770.**

———*Profits—Difficulty in tracing them—Discretion to award interest on value of property.*

Where a person is entitled to profits and a serious difficulty arises in tracing and apportioning the mesne profits, a fixed rate of interest should be awarded in that case on the value of the property; it will be in the option of the Court either to decree the profits or to decree such interest, which it may deem proper in the circumstances. It need not necessarily be the current rate of interest. (*Misra and Srivastava, JJ.*) AMEER HASAN *v.* MUHAMMAD EJAZ HUSAIN. **117 I.C. 456=6 O.W.N. 51=A.I.R. 1929 Oudh 134.**

———*Principle is that person wronged should be restored by monetary compensation to original position.*

The principle to be applied in assessing damages is that the person wronged should be restored by a monetary compensation to the position which he would have occupied but for the wrongful acts of the defendants provided always that such loss as he proves is the natural and direct consequence of the defendant's acts: *United Horse Shoe and Nail Co.* v. *Stewart*, (1889) 13 A.C. 401, Foll. (*Courtney-Terrell, C.J. and Ross, J.*) BALGOVIND *v.* DWARKA PRASAD. **116 I.C. 40=10 P.L.J. 525=A.I.R. 1929 Pat. 530.**

———*Mesne profits must be moulded according to facts of each case.*

Mesne profits is in the nature of damages and it must be moulded according to the circumstances of each case by the Court in its discretion.

A purchaser of the holding of a cultivating tenant, in execution of a mortgage decree, is entitled to mesne profits on the basis of the produce which he might have made if he cultivates the land himself and the indolence of the defendant or his reluctance to cultivate the land himself ought not to be a ground for depriving the plaintiff purchaser of his just dues: 35 Cal. 1000, Foll. (*B.B. Ghose and Panton, JJ.*) JOGENDRA NATH MAITI *v.* RAM GOPAL DAS. **103 I.C. 639=45 C.L.J. 462=A.I.R. 1927 Cal. 616.**

———*Rent is no criterion.*

The rent payable to the landlord is no criterion of the letting value for purposes of ascertaining the mesne profits. (*Kotwal, Offg. J.C.*) CHINDHA *v.* NARAYAN GOVIND RAO. **97 I.C. 705=A.I.R. 1927 Nag. 36.**

———The rental value of the land is the only really fair criterion of the measure of mesne profits. (*Brown*

MESNE PROFITS—Measure of.

J.) MA KIN KYWE *v.* MAUNG TUN MYAT.
101 I.C. 371=5 Bur. L.J. 236=
A.I.R. 1927 Rang. 116.

———*Joint decree against Zamindar and Tenants for possession—Application for mesne profits—Tenants not made parties—Profits awarded.*

Where a decree for possession is passed in favour of the plaintiff as against the zamindar as well as the tenants jointly, the omission to make the tenants parties to proceedings for the recovery of mesne profits would not disentitle the plaintiff from recovering mesne profits from the zamindar on the footing that the zamindar as well as the tenants were joint trespassers: 15 C.W.N. 825, Rel on. (*Greaves and Mukerji, JJ.*) MAHARAJ BAHADUR SINGH *v.* BHUPENDRA NARAYAN SINGH. **98 I.C. 198=44 C.L.J. 182=**
A I.R. 1926 Cal. 1233.

———*Occupancy ryots—Rent payable to landlord must be excluded in calculating mesne profits.*

In calculating the mesne profits to be allowed to the occupancy ryots from the landholders for the period of their exclusion from the land rent payable to the landholders should be deducted. (*Oldfield and Venkatasubba Rao, JJ.*) RAMACHENDRUDU *v.* VENKATANARASIMHA. **73 I.C. 670=17 M.L.W. 545=**
32 M.L.T. 364=1923 M.W.N. 437=
A.I.R. 1923 Mad. 557.=44 M.L.J. 486.

———*Measure of must depend on character of possession of person kept out, on date of ouster.*

The principle, upon which the question whether letting value or cultivation profits are to be awarded as mesne profits depends, is that the loss of the party wrongfully kept out of possession must generally be measured by the actual usufruct of the land during that time on an occupation of the same character as that of the party wrongfully kept out of possession at the date of his ouster or of the last legal occupant whom the plaintiff claims to succeed to if the plaintiff himself never entered into possession. (*Kotwal, A.J.C.*) CHHAGAN LAL *v.* SARDAR. **69 I.C. 560=**
A.I.R. 1923 Nag. 64,

———Mesne profits to be recovered from a trespasser on proprietors private land should be calculated on the basis of actual price of the produce minus actual costs of cultivation. 12 C.W.N. 650 Foll. (*Das and Ross, JJ.*) DAMODAR NARAIN CHOUDHRY *v.* S. A. MILLER. **61 I.C. 754=2 P.L.T. 563=6 P.L.J. 166=**
1921 P.H. C.C, 294=A.I.R. 1921 Pat. 102,

———The gain made by the wrong-doer, and not the loss caused to the person wronged, is the true test to ascertain mesne profits. (*Das and Adami, J.*) TILAKHDHARI SINGH *v.* RAM PRASAD SINGH.
62 I.C. 25 (Pat.)

—Right to.

———*Declaratory decree as to title confers no right to mesne profits.*

Ordinarily, a decree for possession of property or declaratory decree as to title does not *ipso facto* confer any right to mesne profits and such a claim has to be independently established. (*Bhide, J.*) HEM RAJ *v.* BISHESHAR DAS. **120 I.C. 681=**
A.I.R. 1930 Lah. 72.

———*Plaintiff must establish his right to mesne profits and also amount thereof.*

It is the plaintiff that comes into Court not only with a claim for possession of property but also for mesne profits. He is bound to establish not only his right to mesne profits under the circumstances but also the amount thereof. The amount of mesne profits awardable to the plaintiff has to be determined according to the law and if the defendant shows that in such a case the plaintiff can only be entitled to certain

MESNE PROFITS—Right to.

mesne profits after making allowance for the income ascribable having regard to the improvements made, then it follows that the plaintiff cannot in law be entitled to any more. (*Srinivasa Aiyangar and Ananthakrishna Iyer, JJ.*) KUNHI KURUMBAN *v.* LAKSHMI. **111 I.C. 378=A.I.R. 1928 Mad. 387.**

———*Landlord and Tenant—Termination of Tenancy—Tenant continuing in possession—Liability for mesne profits.*

A landlord is not entitled to mesne profits for his premises let out by him for immoral purposes, but once the tenancy is determined and the tenant still continues to remain in possession, mesne profits can be allowed, for it cannot be laid down as a general principle that once premises are used for immoral purposes they shall always remain so and that there is no means of terminating the immoral use of premises, should the landlord wish to terminate such an agreement (*Aston, A. J. C.*) MT. MARIAM BEGUM *v.* MT. MUNGI. **113 I.C. 366=A.I.R. 1928 Sind 173.**

———*Suit to establish title—Court can award mesne profits.*

Where a person is not recorded as in possession of any share in a certain patti and, in order to obtain title to the share in that patti, he is obliged to have a recourse to the civil Court, the civil Court has jurisdiction to award mesne profits for the period he has been kept out of possession subject to the law of limitation. (*Stuart, C. J., and Raza, J.*) UDIT NARAIN SINGH *v.* GUR PRASAD SINGH.
101 I.C. 843=A.I.R. 1927 Oudh 220.

———*Hindu Law—Partition—Excluded co-sharer is entitled to mesne profits.*

There is no absolute rule that in a partition suit each and every claim for mesne profits is necessarily unsustainable. Where plaintiff was excluded from the property the claim clearly lies. 32 Mad. 271; 44 Bom. 179, Dist.; 7 Mad. 564, 9 N.L.R. 145 Foll.; 19 Bom. 532, Appr. (*Findlay, Offg. J. C.*) NILKANTH *v.* GAJANAN. **92 I.C. 364=**
A.I.R. 1926 Nag. 248.

—Acceptance of rent, though under mistake of law, from trespasser, disentitles owner from claiming mesne profits. (*Lord Shaw.*) MITRA SEN SINGH *v.* MT. JANKI KUAR. **82 I.C. 946=46 All. 728=**
51 I.A, 326=23 A.L.J. 172=6 L.R.P.C. 12=
26 Bom. L.R. 1134=40 C.L.J. 468=
20 M.L.W. 566=1924 M.W.N. 703=35 M,L.T. 247=
27 O.C. 208=29 C.W.N. 533=3 Pat. L,R. (Civ.) 169=
A.I.R. 1924 P.C. 213=47 M.L.J. 591. (P.C.)

———*Profits cannot be claimed where Court is in possession of suit land on plaintiff's behalf by operation of order under Criminal Procedure Code, S. 146.*

In an action for mesne profits when the ground of the action is the bare fact of possession, damages can only be recovered for the time possession was actually retained. Where lands remained under attachment by the operation of the order under S. 146, Cr. P. C., and Court was in custody of it on behalf of the rightful owners. *Held*, that it cannot be said that the defendants were in possession of the lands. (*Walmsley and M. N. Mukerji, JJ.*) CHHAGANMULL AGARWALA *v.* AMANATHALLA MOHAMAD PRADHAN.
83 I.C. 529=51 Cal. 853=39 C.L.J. 447=
A.I.R. 1924 Cal. 1010.

———Plaintiff is not entitled to a decree for mesne profits if he was not entitled to immediate possession of the land during the period for which mesne profits were claimed. (*Walmsley and B. B. Ghosh, JJ.*) SHEIKH KARIM *v.* SOBEDAR SHEIKH. **72 I.C. 47=**
A.I.R. 1924 Cal. 531.

MESNE PROFITS—Right to.

———*Suit to set aside sale by Manager—Past profits.*

In a suit to set aside a sale by a manager of the family which is not *prima facie* void but only voidable at the instance of other members of the family, the plaintiff is not entitled to any mesne profits, until the date of the plaint. 19 Cal. 123 and 5 Mad. 449, Ref. (*Phillips and Venkatasubba Rao, JJ.*) RAMASWAMI AIYAR *v.* VENKATARAMA AIYAR. **75 I.C. 406=46 Mad. 815=18 M.L.W. 183=1923 M.W.N. 786=A. I. R. 1924 Mad. 81=45 M.L.J. 203.**

——Where the plaintiff, who had title and possession, was dispossessed by defendant in proceedings under S. 145, Cr. P. C. *Held* : the plaintiff was entitled to mesne profits. (*Mookerjee and Buckland, JJ.*) MIDNAPORE ZAMINDARY CO. LTD. *v.* NARESH NARAYAN ROY. **65 I.C. 833=49 Cal. 37=33 C.L.J, 497=A.I.R. 1922 Cal. 345.**

———*Lessee sub-leasing for the period and the rent of his lease—Lessee not put in possession—Lessee is not entitled to mesne profits or damages against trespasser.*

Plaintiff obtained a lease and on the same day sublet the lands for the same period and for the same rent. But plaintiff did not get possession of the lands which were in the possession of trespassers. Plaintiff sued the trespassers for possession and mesne profits.

Held Per *Wallis, C.J.* the plaintiff was not entitled to recover the actual possession and enjoyment of the land together with compensation for the deprivation of such possession and enjoyment in the shape of mesne profits. It is not the plaintiff, but his lessees who are entitled to such possession and mesne profits. (21 Mad. 288; 19 M.L.J. 347; 39 Mad. 1042 and 18 All. 440, Foll.) He might have recovered damages for loss of rent as lessor, owing to the defendants having trespassed on the lands and prevented him from giving his lessee possession, if he had in fact sustained any such damages.

Per *Sadasiva Aiyar, J.*—Where the lessee is not put into possession, the lessor is entitled to obtain a decree for khas possession against a stranger trespasser (29 M. L. J. 233, Foll.) But the plaintiff is in his own. primary right entitled only to formal possession and it is in his secondary right arising out of his obligation to put his lessee in actual possession that he is awarded actual possession. Under his primary right to formal possession, he is entitled only to claim as damages the loss of rent (if any) arising from the injury caused to that primary right by the defendant's trespass because the plaintiff's lessee was not bound to pay rent till he got possession and the plaintiff would (if he lost anything) be losing his rents only during the defendant's trespass. The plaintiff is not entitled to claim the net mesne profits. The answer to the question whether he is entitled to claim damages in the shape of rents lost will depend on whether he has really incurred damages in the shape of the rents lost. Observations of Sundara Aiyar, J., in 1912 M. W. N. 669, Dissented from. (*Wallis, C. J., and Sadasiva Aiyar, J.*) (DAVOOD) MOHIDEEN ROWTHER *v.* JAYA RAMA AIYAR. **62 I.C. 284=44 Mad. 937=-1921 M.W.N. 43=13 M.L.W. 281=A.I.R. 1921 Mad. 42=40 M.L.J. 38.**

—Suit for.

It is manifestly incorrect to say that in a suit for mesne profits if the defendant denies the extent of the plaintiff's share in the property, that question cannot be decided in the suit and the claim for the profits of the portion of the share denied must be dismissed.

MINES AND MINERALS—Claim for.

(*Hallifax, A.J.C.*) JAINAPSI *v.* GULAM MOHIUDDIN. **69 I. C. 545=A. I. R. 1923 Nag. 55.**

MIGRATION.

See HINDU LAW—(1) APPLICABILITY OF, (2) SCHOOLS OF LAW.

MINERALS.

See (1) LANDLORD AND TENANT—MINES AND MINERALS. (2) MINES AND MINERALS.

MINES AND MINERALS.

See also LANDLORD AND TENANT—MINES AND MINERALS.

—Claim for.

———*Holder of permanently settled estate can claim minerals against trespasser where the Government never claimed prior to the suit though Government being not party is not bound by the decision.*

Where the Government have not claimed the minerals under the Mouzah in question the holder of an estate which is noted as settled permanently in the record-of-rights and in the collectorate register of revenue-paying estates, can claim the right to the minerals as against trespassers. The Government however will not be prejudiced by a decision in such a suit where it is not a party to the suit. (*Das and Ross, JJ.*) DEBI SINGH *v.* F. E. CHRISTIAN **84 I. C. 429=1924 P. H. C. C. 201=A. I. R. 1924 Pat. 776.**

———*South Africa—Precious Stones Act (II of 1899) of the Cape of Good Hope, S. 41—Owner having permitted duly licensed prospector to prospect, change of ownership subsequently does not affect the Government's right to proclaim the property a mine.*

The present tense in "so long as the owner does not prospect or give permission" must be a form of expression used in the past sense, a sense which might have been better put into words by saying "in the event of the owner not having prospected or given permission to prospect." The Act makes a proclamation on the legitimate culmination of the other steps which have been legitimately taken—licensing, leave, prospecting, inspecting, Government satisfaction—all as set forth in the Act. The only one of these steps in which the owner of the surface had to be appealed to was the step of leave given by him to a person duly licensed by the Government to prospect. All the other steps, once that leave be granted, duly proceed under the statute. The owner then who is referred to in the phrase, "so long as the owner does not prospect or give permission" is that owner who *de facto* had prospected or given permission. Where the owner gave permission, and once this statutory procedure has thus been set in motion, it is, illegitimate, by a transfer of a ownership, to avoid the regular sequence of procedure up to a proclamation. When leave is granted by the owner for the time being to a prospector, and once the prospector, having, it may be, had imposed upon him very onerous terms and conditions, has obtained the surface owner's leave, that prospector, as well as the Government, has rights under the statute which fall to be respected. The term "owner" in Section 41, cannot be construed as owner at the date of issue of the proclamation. It means the owner at the time of the prospecting or granting of the leave to prospect. Once that leave has been granted,then the conditions had been satisfied and the words "so long as" which truly mean "in the event of" have been given their full scope. (*Lord Shaw.*) THOMPSON *v.* MALAN.

A. I. R. 1921 P. C. 144. (P.C.)

MINES AND MINERALS—Damages.

—Damages.

———*Damages for trespass or trover vary according to party's interest in the land—Lessee from Government is not entitled to remove minerals or earth—Damages awarded to him must be assessed on the diminution in the value of his land.*

Damages for trespass or trover vary considerably according to the party's interests in the land.

A lessee of Government, holding the land for cultivation or grazing purposes only, has no right to minerals or to take out and cart away the earth and, therefore, cannot claim for the earth removed.

The damages awardable to the lessee for removing the earth over his land by the defendant must be assessed on the diminution in the value of his land: *Whitwham* v. *Westminister Brymbo Coal and Coke Co.* (1896) 2 Ch. 538, Dist. (*Baguley, J.*) BURMA RAILWAYS CO. LTD. *v.* MAUNG HLA TIN. **107 I.C. 175=5 Rang. 813=A.I.R. 1928 Rang. 85.**

———*Mining lease—Damages, measure of, cannot be fixed.*

Neither twenty times annual rent of a plot included in the mining lease nor one year's rent is the measure of damages to be awarded for letting down the surface for cultivation purposes. (*Ross, J.*) LAKURKA COAL CO. *v.* BISESWAR CHATTERJI. **A.I.R. 1923 Pat. 296.**

—Right to.

———*Lease—Construction—Grant of all zamindari rights in the land—Grant of right to minerals is not included.*

A grant of patni taluk provided: "You shall be in possession of all the zamindari rights and interest as prevailing from before in the lands included in the said mauza from before." There was nothing to show that sub-soil rights were included in the grant.

Held: that the zamindari rights were conferred in the subject-matter of the grant and the grant of zamindari rights on what was expressly conveyed did not increase the actual corpus of the subject affected by the patta. They only gave expressly what might otherwise quite well be implied, namely, that that corpus being ascertained there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but it may be of rights of passage, water, or the like, which enure to the subject of the patta and may even be derivable from outside properties: A.I.R. 1917 P.C. 163, Ref. (*Das and Allanson, JJ.*) TRANGOBINDA SAHU *v.* SATYA NIRANJAN. **112 I.C. 659=8 Pat. 190=9 P.L.T. 593=A.I.R. 1928 Pat. 482.**

———*Surface land not covered by the grant—Use of, is confined to such things only as are necessary for working the mines.*

It is settled law that a right of using the surface to which the mine owner may be entitled by implication is confined to such things as are reasonably and strictly necessary for the convenient working of the mines. The mine owners have no other rights of any description whatsoever unless these rights are to be found within the four corners of the grant in their favour. (*C. C. Ghose and Panton, JJ.*) HARIPADA BANDOPADYA *v.* EQUITABLE COAL CO. LTD. **76 I.C. 413=A.I.R. 1923 Cal. 335.**

———*Australia—Crown Lands Act* (1884) *of New South Wales—Grant with reservation of minerals—Question whether limestone also reserved.*

In order to determine whether the reservation of minerals in a certain grant by the Crown had the effect of reserving the limestone in the land, if the question fell to be decided on the terms of the grant alone and without reference to the Crown Lands Act of 1884, it must be ascertained whether, having regard to the facts and circumstances existing at the date of the grant, and the meaning then given to the word "minerals," the reservation of minerals included the limestone. (Case-law referred.) (*Viscount Cave,*) AUSTRALIA COMMONWEALTH *v.* HAZELDELL, LIM. **A.I.R. 1921 P.C. 224.**

MINOR—Admissions of Guardian.

———*Australia—New South Wales Mining Act* (1906)—*Ss.* 46 *and* 70—*Construction.*

No clear intention appears in the New South Wales Mining Act of 1906. Therefore the Act cannot be construed as throwing open to public mining, minerals granted by the Crown to private purchasers. (*Viscount Cave.*) AUSTRALIA COMMONWEALTH *v.* HAZELDELL, LIM. **A.I.R. 1921 P.C. 224.**

MINOR—

Admission by Pleader.
Admissions of Guardian.
Alienation by Guardian.
Appointment of Guardian.
Arbitration.
Compromise.
Contract by Guardian.
Contract by Minor—*See also* SP. REL. ACT, S. 41.
Debts by Guardian.
Degree against.
Estoppel.
Execution Proceedings.
Guardian "ad litem".
Insolvency of.
Misrepresentation by.
Plaint—*See* CIVIL P. C. O. 4, R. 1.
Plea of Minority.
Possession by Guardian.
Powers of Guardian.
Proof of Majority.
Refund of Benefit—*See* CONTRACT ACT, S. 64.
Suit by.
Tort by Guardian.
Transactions in favour of.
Miscellaneous.

See also (1) C. P. CODE, O. 32.
(2) CONTRACT ACT, S. 11.
(3) DECREE SETTING ASIDE.
(4) EVIDENCE ACT, S. 115.
(5) GUARDIAN AND WARD.
(6) GUARDIANS AND WARDS ACT.
(7) HINDU LAW—MINORITY AND GUARDIANSHIP.
(8) LIMITATION ACT, ART, 44.
(9) MAHOMEDAN LAW—GUARDIANSHIP.
(10) MINORS ACT.

—Admission by Pleader.

———*Legal Practitioner—Admission by; on law point cannot affect minor.*

The interest of a minor cannot be affected by the admission on a law point by a pleader. (*Kinkhede, A.J.C.*) LAXMI *v.* VENKATRAO. **82 I.C. 1052=A.I.R. 1925 Nag. 207.**

—Admissions of Guardian.

———*Guardian cannot make admissions on his behalf but intention to hold adversely will not be ascribed to minor if guardian did not so hold.*

Guardians cannot make admissions on behalf of their wards. As a general proposition this is perfectly sound; but where the guardian does not either by words or acts show that he believed or intended to hold adversely on behalf of his ward, that intention cannot be imputed to the ward, (*Schwabe, C. J. and*

MINOR — Alienation by Guardian—Benefit of Minor.

Coutts-Trotter, J.) SHANMUGAPPA *v.* SANGARAYA CHETTY. **74 I.C. 120=18 M.L.W. 907=33 M.L.T. 225=1924 M.W.N. 90=A.I.R. 1924 Mad. 125.**

—Alienation by Guardian—Benefit of minor.

An alienation of a minor's property by the guardian not effected with a view to further the interests of the minor cannot take away the minor's rights. (*Macnair, Offg. J. C.*) NARBADI *v.* CHOOTI. **117 I.C. 281=A.I.R. 1929 Nag. 129.**

———*Alienation by self-constituted guardian—Minor must restore benefit when avoiding alienation.*

Although a minor can avoid an alienation of his property effected by a self-constituted guardian, he is bound to restore any benefit that he might have derived from such alienation; A.I.R, 1926 Lah. 170, Foll. (*Dalip Singh, J.*) KHAIRU *v.* DHERU. **99 I.C. 374=A.I.R. 1927 Lah. 722.**

———*Guardian and Ward—Alienation by* de facto *guardian—Step-mother—Alienation for benefit of minor is valid.*

Where there is ample proof that the step-mother the *de facto* guardian of the minor managed the estate of the minor that she increased the value of that estate very much, that from the time of plaintiff's grandfather it was usual as it is in the case of ground landlords of a rising town to grant licenses and leases for building purposes, and that the mother continued what family had been doing.

Held that step-mother as the *de facto* guardian had power to make or to extend the licenses covering the sites in suit, and that the granting of the licenses was beneficial to the minor's estate. 10 N.L.R. 133. Disapp.

Held: further that if the *de facto* could herself grant these licenses she can delegate her power to another person. (*Prideaux, A. J. C.*) GANPAT *v.* FIRM OF BISSESARLAL GOVINDRAM, OWNERS, HARDATTA. **71 I.C. 491=8 N.L.J. 110=A.I.R. 1923 Nag. 230.**

——Where a transfer of the minor's property is effected by his guardian for the benefit of the minor, and the latter, after attaining majority, continues to derive the benefit, it is not open to him to take advantage of the absence of registration, particularly when the parties can no longer be restored to their old positions without material prejudice to one of them. A minor has a right to repudiate an act done by his guardian if it is prejudicial to his interests. (*Kanhaiya Lal, J. C.*) RAGPUPAR *v.* RAM BHAROSE. **66 I.C. 412=8 O.L.J. 392=A.I.R.1922 Oudh 217.**

—Alienation by Guardian—Doctrine of legal necessity.

In dealing with the guardian of a minor, the lender is bound to enquire into the necessities for the transaction into which he is invited by the guardian to enter and to satisfy himself that the guardian is acting, in the particular instance, for the benefit of the ward. No authority imposes upon the lender the further duty of enquiring into the necessity for an altogether different transaction which perhaps has made the proposed transaction inevitable. If the law did impose such a duty upon the lender, then it might be said that he is bound to enquire into the antecedent management of the estate. But it is settled law that, provided the necessity for the loan has not arisen from any misconduct to which the lender is or had been a party, he is not affected by the precedent mismanagement of the estate. (*Das and Adami, JJ.*) KANHAILAL KHEMKA *v.* THAKUR PRASAD SINGH. **79 I.C. 9=2 Pat. L.R. Civ. 285=5 P.L.T. 594=A.I.R. 1923 Pat. 268.**

—Alienation by Guardian—Setting aside.

In dealing with a guardian of a minor, the lender is bound to enquire into the necessities for the transaction into which he is invited by the guardian to enter and to satisfy himself that the guardian is acting, in the particular instance, for the benefit of the ward. It is settled law that, provided the necessity for the loan has not arisen from any misconduct to which the lender is or had been a party, he is not affected by the precedent mismanagement of the estate. (*Das and Adami, JJ.*) KANHAI LAL KHEMKA *v.* THAKUR PRASAD SINGH. **79 I.C. 9=2 Pat. L.R. Civ. 285=5 P.L.T. 594=A.I.R. 1923 Pat. 268.**

—Alienation by Guardian—Lease

A lease of a minor's property by a person, not a certificated guardian nor a near relation, is not binding on the minor unless the lessee can prove that the lease was for the benefit of the minor. (*Rafique and Piggott, JJ.*) LALA *v.* RAMCHENDER. **63 I.C. 255. (All.)**

—Alienation by Guardian—Sale.

An alienation of the property of a minor by a person who is that minor's guardian *de facto*, but not *de jure* is not merely voidable but absolutely void, and the minor need not sue to have it set aside before he can obtain possession of the property. (*Baker, J. C.*) PUNJALE RAO *v.* ATAMARAM. **87 I.C. 1018=A.I.R. 1926 Nag. 124.**

———A minor's property was sold by his mother as guardian. On attaining majority he ignored the sale by his mother and conveyed the property to the plaintiff who sued for possession. *Held* that by selling the property to the plaintiff on the ground that the prior sale by his mother was not binding on him the plaintiff's vendor had chosen to avoid the prior sale and that the plaintiff could sue for recovery of possession of the property without a prayer for setting aside the original sale by mother. (38 Mad. 867=29 M.L.J. 617, *Foll.*). (*Ramesam and Coleridge, JJ.*) P. KAMARAJU *v.* C. GUNNAYYA. **74 I.C. 1003=18 M.L.W. 233=1923 M.W.N. 756=A.I.R. 1924 Mad. 322=45 M.L.J. 240.**

—Alienation by Guardian—Setting aside.

———*Refund of benefit.*

Where the guardian effected an invalid sale and his subsequent purchaser who got a valid title sued the original vendee for possession,

Held that the Court could grand a decree for possession conditional on the plaintiff restoring to the prior vendee the monies which he had advanced for the benefit of the minor. (*S. K. Ghose, J.*) NAGENDRA NATH GHOSE *v.* MOHINI MOHAN BOSE. **34 C. W. N. 948.**

——Heir of minor who died under age can sue to set aside alienation by minor's guardian. (*Odgers, J.*) B. SITAYYA *v.* P. RAMASWAMI. **91 I.C. 758=22 M.L.W. 476=1925 M.W.N. 587=A.I.R. 1925 Mad. 1288.**

———*Declaratory suit by minor reversioner to set aside unnecessary alienation is allowable when* bona fide *for minor's interests but not so if minor is mere figurehead and real plaintiff is alienor himself.*

A declaratory decree may be given in a suit to contest an unnecessary alienation if the suit is brought honestly on behalf of a minor reversioner to protect his interests. But it would not be proper to pass such a decree in a case in which the minor is merely a figure-head and the real plaintiff is the alienor himself

MINOR—Alienation by Guardian—Transfer of Decree.

who has caused the suit to be instituted for the purpose of undoing his act. (*Martineau and Moti Sagar, JJ.*) DAD *v.* LAL. **82 I.C. 626= 5 Lah. 389=6 L.L.J. 334= A. I. R. 1925 Lah. 24.**

—Alienation by Guardian—Transfer of decree.

———*Decree in minor's favour—Transfer of decree by guardian without Court's sanction is voidable only and not void.*

A decree is property and the guardian of a minor can deal with it and exercise the same powers with respect to it as he does with respect to the other properties of a minor. He may on proper grounds make an alienation of such property and if the alienation is bad, it will be open to the minor to set it aside on attaining majority. Even a compromise entered into without the sanction of the Court as required by O. 32, R. 7, Civil P. C., is only voidable at the instance of the minor. Hence a transfer of a decree passed in favour of a minor without the sanction of the Court is not void and the transferee can enforce execution of such decree. (*Abdur Rahim and Odgers, JJ.*) GOVINDARAJULU NAIDOO *v.* RANGA RAO. **62 I.C. 255=13 M.L.W. 97= 1921 M.W.N. 98=A.I.R. 1921 Mad. 113= 40 M.L.J. 124**

—Alienation by Guardian—Validity of.

Where a creditor established legal necessity in respect of Rs. 27,000 out of Rs. 30,000.

Held : he is entitled to a decree for the whole of the amount but he is not entitled to money charged by him as commission and deducted from the loan while making the advance. (*Das and Allanson, JJ.*) MAHABIR DAS *v.* JAMUNA PRASAD. **112 I.C. 438= 8 Pat. 48=9 P.L.T. 553=A.I.R. 1928 Pat. 543.**

———The payment of the barred debts on behalf of minors cannot be regarded as being beneficial to the minors and will not justify an alienation of minors' property to pay off those debts. (*Broadway and Fforde, JJ.*) KARMANT *v.* FAZAL HUSAIN. **95 I.C. 105=A.I.R. 1927 Lah. 33.**

———A transferee from minor can plead want of legal necessity for a prior alienation by the minor's guardian. (*Kotwal, A. J. C.*) (HAJI) SHEIKH MOHAMED *v.* RAMCHANDRA. **90 I.C. 74= A. I. R. 1926 Nag. 179.**

———*Hindu Law—Alienation by paternal uncle in presence of minor's mother does not bind minor.*

Paternal uncles are not natural guardians in the presence of the minor's mother and therefore have no power to mortgage minor's share in joint property and therefore a mortgage by paternal uncle is not binding on minor, though he may have derived benefit under the mortgage. (*Le Rossignol, J.*) HARDWARI *v.* CHUNI LAL. **80 I.C. 735=6 L.L.J. 182= A.I.R. 1924 Lah. 533.**

———*Right to challenge is personal privilege and cannot be claimed by a subsequent transferee.*

Though a minor may sue through a next friend to set aside a transfer even during his minority, he and he alone can exercise this personal privilege. A transferee, is not entitled to question a previous transaction or to assume the privileges which are personal to the minor and to nobody else, whether the transfer was effected after or before the minor attained majority. (*Le Rosignol and Harrison, JJ.*) HAFIZULLAH KHAN *v.* BULAQI MAL. **75 I.C. 99=4 Lah. 156= 6 L.L.J. 42=5 L.L.J. 355=A.I.R. 1923 Lah. 299.**

———The plea of the invalidity of a sale by a minor's guardian is available not only to the minor personally after he came of age but also to the transferee.

MINOR—Compromise.

3 B. L. R. A. C. 426, Dist; 11 N. L. R. 1 Foll. (*Hallifax, A. J. C.*) MOHANLAL *v.* KISAN. **62 I.C. 313= 17 N.L.R. 53=4 N.L.J. 111=A.I.R. 1921 Nag. 18.**

—Appointment of Guardian.

———*Court should consider minors wishes also—Paternal grandmother has strong claim in absence of mother—Being a pardanashin no disqualification.*

In appointing a guardian for a minor it is desirable, if possible, that Court should consider the wishes of the minor as to the person who should be appointed, 14 All. 35, Ref. The mother of a minor is more frequently than not, in the absence of any more suitable person, appointed a guardian and the paternal grandmother has also a strong claim in the absence of a mother to be so appointed. The mere fact that the paternal grandmother is a pardanashin lady is not in itself a sufficient ground for rejecting entirely her claims, especially when the minors desire her appointment. (*Dawson Miller, C. J., and Ross, J.*) RAJENDRA PRASAD *v.* PRABODH CHANDRA MITRA. **59 I.C. 936=2 P.L.T. 116=6 P.L.J. 82= 1921 P.H.C.C. 156=A.I.R. 1921 Pat. 25.**

—Arbitration.

Where a minor is not validly represented in the award and subsequent Court proceedings by his guardian, the guardian having an interest adverse to the minor, proceedings against him are not binding on the minor : A. I. R. 1924 Mad. 297 ; and A. I. R. 1922 All. 91, Ref. (*Findlay, J. C.*) VINAYAK *v.* SITABAI. **103 I.C. 373=A.I.R. 1927 Nag. 312.**

—Compromise.

A guardian of a minor or next friend cannot compromise or make admissions to the minor's prejudice. (*Jackson, A. J. C.*) GONDU *v.* TULSIRAM. **120 I.C. 335=A.I.R. 1930 Nag. 27.**

———*Compromise in appeal—Minor Respondent's remedy in case of unfair compromise.*

Where a compromise is effected between the parties to a sutt in which some defendants are minors and it is obtained by fraud or under some other circumstances as to render it invalid, the remedy of the minors is not by filing cross-objections in an appeal by one of the defendants. (*Wild, J. C. and Rupchand Bilaram, A. J. C.*) MT. UMMAKULSUM *v.* GULAM RASUL KHAN. **114 I.C. 101= A.I.R. 1929 Sind 32.**

———*Compromise by minor is void.*

A consent decree does not stand on a higher footing than a contract between the parties, and the Court has jurisdiction to set aside a consent decree upon any ground which would invalidate an agreement between the parties and as it is essential to the validity of a contract that all contracting parties should be competent to contract and as a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Contract Act, it follows that a compromise entered into with a minor is entirely void and cannot be given effect to in a Court of law. (*Das and Adami, JJ.*) GANGANAND SING *v.* RAMESHWAR SING. **102 I.C. 449=6 Pat. 388= 8 P.L.T. 730=A.I.R. 1927 Pat. 271.**

———*Guardian surrendering infant's right—Court should not sanction, unless it is for the benefit of the minor.*

No contract or consent order amounting to an apparent surrender or variation of infant's right ought to be sanctioned or listened to for one moment by any Court without requiring some material calculated to satisfy its mind and without being satisfied, as far as it can be, on materials which are necessarily imperfect that the proposed arrangement is *bona fide* intended

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for the benefit of the infant. (*Piggot and Walsh, JJ.*) JHINKU SINGH *v.* SITAL SINGH. **74 I.C. 133= 21 A.L.J. 81=45 All. 263=4 L.R.A. Civ. 329= A.I.R. 1923 All. 267.**

——*Minor attaining majority before decree—Compromise by guardian* ad litem—*Minor cannot impeach decree.*

A *quondam* minor cannot maintain a suit for a declaration that a decree passed against him on a compromise accepted on his behalf by his guardian *ad litem* with the consent of the Court, shall be of no effect, on the ground that at the time of the compromise and decree the plaintiff had become *sui juris*; and consequently was not represented before the Court. A minor who at the date of decree has attained majority may not impeach a decree passed against him by a separate suit on the ground of fraud or gross negligence of his guardian. (*Le Rossignol, J.*) GHULAM NABI *v.* BAGHESHAR. **74 I.C. 603= 4 Lah. L.J. 298=A.I.R. 1922 Lah. 407.**

—Contract by Guardian.

——*Alienation.*

It is not within the competence of a guardian of a minor to bind him with a contract to alienate property and such contract if entered into cannot be enforced against the minor : 39 *Cal.* 232 (*P.C.*), *Foll.* (*Graham and Mitter, JJ.*) MONOHAR DAS MOHANTA *v.* TARINI CHARAN NANDI. **34 C.W.N. 135= A. I. R. 1929 Cal. 612.**

——*Contract by guardian for purchase of immovable property—Minor cannot claim specific performance after majority.*

It is not within the competence of the guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property. The minor is, consequently, not bound by the contract and there being no mutuality he cannot, after attaining majority, obtain specific performance of the contract : 39 Cal. 232 (P. C.), Foll. (*Shadi Lal, C.J., and Agha Haider, J.*) MALLA *v.* MAHOMED SHARIF. **99 I.C. 684=8 Lah. 212=28 P.L.R. 492= A.I.R. 1927 Lah. 355.**

——*Guardian cannot bind minor by contract to sell.*

It is not within the competence of the guardian of a minor to bind the minor by a contract for sale of immovable property to pay off the debts of the minor's father. In this respect a conveyance stands in a different position from a contract for sale: 39 Cal. 232 (P.C.) Foll. (*Greaves and Mukerji, JJ.*) SRINATH *v.* JOTINDRA MOHAN. **89 I.C. 892=30 C.W.N 263= A.I.R. 1926 Cal. 445.**

——*Minor cannot be sued for specific performance of contract for sale made by guardian.*

The natural guardian of a minor cannot impose a personal liability on the minor by a contract entered into by the guardian on the minor's behalf. Hence a minor is not liable to be sued for specific performance of a contract for the sale of moveable property. (*Mears, C.J, and Mukerji. J.*) SWARATH RAM *v.* RAM BALLABH: **89 I.C. 27=47 All. 784=23 A.L.J. 625= 6 L.R.A Civ. 465=A.I.R. 1925 All. 595.**

——*Minor's rights to enforce contract of marriage.*

Contract made by the natural guardian of a minor so as to be binding on the minor, which is for the minor's benefit, is enforceable at law.

Minor can maintain suit for damages for breach of contract of marriage entered into on minor's behalf by the minor's natural guardian. Case law discussed. (*Taraporewala, J.*) ROSE FERNANDEZ *v.* JOSEPH GONSALVES. **85 I.C. 587=48 Bom. 673= 26 Bom. L.R. 1035= A.I.R. 1925 Bom. 97.**

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——A minor represented by a Court of Wards can be sued for specific performance of an agreement to grant lease even though the Board of Revenue has refused to order the Manager to execute the lease. (*Jwala Prasad and Kulwant Sahay, JJ.*) RUDRA DAS *v.* KAMAKHYA NARAYAN. **84 I.C. 178=3 Pat. 968= A.I.R 1925 Pat. 259.**

——*Contract by manager is enforceable under Bombay rules of practice by getting sanction from Court.*

Contract for sale by a person, who is the manager of a joint Hindu family which included minor brothers is enforceable. The difficulty about the minors in such a case is in Bombay got over by an appointment of a guardian and sanction to the proposed alienation in accordance with the ruling in *In re Manilal Hurgovan* 25 Bom. 353. (*Fawcett and Coyajee, JJ.*) KARSANDAS KALIDAS *v.* CHHOTALAL MOTICHAND **77 I. C. 275=48 Bom. 259=25 Bom. L.R. 1037= A.I.R. 1924 Bom. 119.**

——*Specific performance of guardian's contract.*

Specific performance of a contract by minor's guardian for the sale of immovable property which at the time was for the benefit of the estate, can be decreed notwithstanding there is an offer of better price subsequent to the contract. (42 Mad. 183, *Foll*). (*Devadoss, J.*) KASIWASI CHIDAMBRA SWAMIGAL *v.* RAMAKRISHNA REDDIAR. **82 I.C. 926=20 M.L.W. 559= 35 M.L.T. 110=1924 M.W.N. 878= A.I.R. 1924 Mad. 863=47 M.L.J. 683.**

——*Contract to sell minor's property is not capable of specific performance.*

Specific performance will not be granted where *de facto* guardian has entered into a contract with a third party for the sale of the minor's property. To direct the contract to be carried into effect as against the minors is to sanction a plain breach of trust on the part of *de facto* guardian, 45 C. 878, Foll. (*Das and Foster, JJ.*) ABDUL HAQ *v.* MOHAMMAD YEHIA KHAN. **78 I.C. 483=4 P.L.T. 553= 2 Pat. L.R. Civ. 181=A.I.R. 1924 Pat. 81.**

——*Guardian's act if beneficial binds minor.*

Where the contracting party is a minor represented by a guardian, and the contract was clearly for the benefit of the minor and was made at the request of the guardian for the convenience and benefit of the minor's interest, it binds the minor. (*Walsh, J.*) JWALA PRASAD *v.* RAGHUBIR PRASAD. **70 I.C. 833= A.I.R. 1923 All. 17.**

——*Ratification—Minor can ratify after attaining majority.*

A contract entered into by a guardian is voidable by the minor on attaining majority but not void. Sub-S. (3) of S. 25 applies to the case of a minor who executes a promise in writing to pay a debt incurred by his guardian. A minor's contract is void and cannot be ratified even within limitation, so that as far as the minor is concerned Sub-S. (3) must refer to a debt incurred by the guardian since it cannot refer to a debt incurred by the minor himself during his minority. (*Batten, J. C.*) NANDRAM *v.* RANCHODDAS. **65 I.C. 716=5 N.L.J. 178=19 N.L.R. 135= A.I.R. 1922 Nag. 250.**

——*Contract entered into by manager of joint Hindu family can be specifically enforced against minor members.*

Where the manager of a joint Hindu family including minors, enters into a contract on behalf of the family, he does not do so as guardian for the

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minors but as Manager of the family and the contract can be specifically enforced against the whole family, including even the minors. The suit for specific performance will not be dismissed on the ground that the contract lacks mutuality having been made by or on behalf of minors who are not competent to contract. (*Hallifax, A. J, C.*) THAKUR HARGOVIND *v.* MEHTAB SINGH. **68 I.C. 346=18 Nag. L.R. 67= A.I.R. 1922 Nag. 193.**

——*Hindu Law.*

If a guardian acted in the interests of the minor's estate and took over certain crops belonging to a third person, for the benefit of the estate, the estate would be liable for the value of the crops so taken, 28 Bom. 330 and 40 Mad. 632, followed. (*Kotval, A. J. C.*) CHATARIA *v.* DAWLAT. **66 I.C. 468=5 N.L.J. 206= A.I.R. 1922 Nag. 48.**

———The guardian cannot bind the estate of a minor by a personal covenant.

Where a handnote passed by the guardian does not purport to bind the estate of the minor, the estate itself cannot be bound though it may have benefited the minor. 35 Cal. 320, Foll. (*Coutts and Sultan Ahmad, JJ.*) KASHI PRASAD SINGH *v.* AKLESHWARI PRASAD NARAIN SINGH. **2 P.L.T. 35= A.I.R. 1921 Pat. 336.**

—Contract by Minor.

———*Contract in favour of minor can be enforced by him.*

A minor can enforce a contract made in his favour for a valuable consideration as while no liability can be incurred by a minor he is not debarred from acquiring a title to anything valuable : 30 Cal. 539 (P.C.), Rel. on ; 33 All. 657 ; 38 All. 62 ; 38 All. 154 ; 30 All. 63 ; 37 Mad. 390 and 4 Pat. L. J. 682, Ref. (*Broadway and Zafar Ali, JJ.*) BHOLA RAM HARBANS LAL *v.* BHOGOT RAM. **99 I.C. 318= 8 L.L.J. 539=A.I.R. 1927 Lah. 24.**

———*Contract void for one party's minority cannot be consideration for fresh contract by minor on attaining majority unless pre-existing liability is enforceable.*

A contract entered into by a person on attaining majority cannot be supported on the consideration of the liability on that person under a contract which is void by reason of that person having been a minor at the time of making it. The hypothecation of property by a minor on attaining majority, to secure payment of debt under a contract by the minor's father is void. But where proof is given that the liability was incurred in consideration of necessaries or for benefit of the minor or that at the time the hypothecation was made the creditor had a genuine claim against the minor, enforceable by suit and that the creditor on an adjustment of the accounts accepted a certain sum and undertook not to sue, the hypothecation will stand. (*Dawson Miller, C.J., and Kulwant Sahay, J.*) CHIKHURI RAM *v.* GOPAL NARAYAN. **75 I.C. 1002= A.I.R. 1925 Pat. 254,**

——Where the portions of the purchase money to be paid by each of the two co-vendees were not specified, *held* the transaction was a joint one and as such enforceable against the major vendee under S. 43, although void as regards the minor vendee. 39 Mad. 409 (P. C.) and 66 P. R. 1896 Foll. (*Harrison and Zafar Ali, JJ.*) SAIN DAS *v.* RAM CHAND. **85 I.C. 701=4 Lah. 334=5 L.L.J. 469= A.I.R. 1924 Lah. 146.**

———*Pre-emption, minor is not en titled to.*

The moment minor (pre-emptor) plaintiff elects to buy the property he affirms the contract and the same legal consequences follow as if there was a contract to

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buy and it is difficult to distinguish the case from the case of an ordinary contract to purchase. Although there is no mutuality in its inception, when the plaintiff elects to purchase the property and gives notice of his intention to buy it becomes a contract like any other contract to purchase immovable property and is governed by the same principles which govern other contracts. 39 Cal. 232 : (P.C.) applies therefore to such cases. There being no mutuality pre-emption cannot be decreed. (*Kumaraswami Shastri, J.*) VISVANATHAN CHETTY *v.* ETHIRAJULU CHETTY. **75 I.C. 467=A.I.R. 1924 Mad. 57= 45 M.L.J. 389.**

———The minor, who seeks to recover the property sold by him is bound in equity to refund the purchase-money under Section 41 of the Specific Relief Act as a condition precedent to obtaining a decree for possession. (*Moti Sagar, J.*) KAPURA *v.* HARDIT SINGH. **75 I.C. 261=A.I.R. 1923 Lah. 510.**

———*Legal necessity to be invoked only to protect a minor's estate.*

The doctrine of legal necessity has application only when the minor has an estate or a fund which it is the duty of the Court of equity to protect as against the improvident act of the guardian.

A minor bought with funds supplied by his aunt a property which had been sold in execution of a mortgage decree. As full purchase money had not been paid to avoid confirmation of sale in execution of mortgage decree, the property was mortgaged by the minor purchaser and the vendors became sureties.

Held, looking at the two transactions as one, once it is realized that the minor was not in possession of any estate independently of the transaction which he was seeking to challenge, it becomes manifest that the Court cannot extend its protection to the minor by denying validity to the transaction which had brought the estate into existence.

In dealing with a guardian of a minor, the lender is bound to enquire into the necessities for the transaction into which he is invited by the guardian to enter and to satisfy himself that the guardian is acting, in the particular instance, for the benefit of the ward. No authority imposes upon the lender the further duty of enquiring into the necessity for an altogether different transaction which perhaps has made the proposed transaction inevitable. If the law did impose such a duty upon the lender, then it might be said that he is bound to enquire into the antecedent management of the estate. But it is settled law that, provided the necessity for the loan has not arisen from any misconduct to which the lender is or had been a party, he is not affected by the precedent mismanagement of the estate. (*Das and Adami, JJ.*) KANHAILAL KHEMKA *v.* THAKUR PRASAD SINGH. **79 I.C. 9= 2 Pat. L.R. Civ. 285=5 P.L.T. 594= A.I.R. 1923 Pat. 268.**

———*Misrepresentation—Minor seeking to avoid must restore property over which he has control.*

The Court would at least direct restitution by the minor of such part of the consideration of a void agreement which may be in his hands. Even in the case of innocent misrepresentation, the minor is bound to refund the property over which he has control. This liability attaches to a minor not on the ground of estoppel but on the ground that an infant shall not take an advantage of his own fraud. If therefore a contract has been induced by a minor's false representations the contractual obligation is under no circumstances enforced against him but equity may compel him to restore any benefit received

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by him. If the property which the minor has obtained is still existing *in specie* he may be compelled to restore it but if he has obtained money which has probably been spent and there is no possibility of tracing it and therefore of restoring the very thing obtained by fraud, it would be enforcing a void contract if he were made to repay it. In other words a distinction must be observed between restitution and repayment. The minor plaintiff praying relief must perform equity if he seeks equity and the Court may therefore under S. 41, Specific Relief Act require him to restore any property, in his possession which he has obtained, by his misrepresentation. Such compensation does not extend to moneys received and spent by the minor, (*Kennedy, J. C., Raymond and Kemp, A. J. Cs.*) MT. HARI *v.* ROSHAN KHUDABUX. **71 I.C. 161= 16 S.L.R. 112=A.I.R. 1923 Sind 5 (F.B.)**

——When the validity of a contract is questioned on the ground that the executant is a minor it is for the party setting up the deed to establish by *prima facie* evidence that the contract was valid and entered into by a person who was competent to do so. (*Stuart, J.*) BACHCHA LAL *v.* HASAN KHAN. **66 I.C. 814= A.I.R. 1922 All. 240.**

—Debts by Guardian.

——*Debts incurred by guardian for minor's business—Creditor can proceed against the assets provided guardian has not acted improperly.*

Minor cannot be personally made liable for any debt incurred by his guardian on his own personal liability : 11 Bom. 551 (P.C.) and A.I.R. 1919 P.C. 129, Foll.

But if a guardian incurs a debt for the purpose of carrying on a business of a minor which was continuing from before the date of the debt incurred by the guardian, then, as the guardian is entitled to indemnify for liabilities properly incurred out of the assets of the minor embarked in the business, creditors of the business are entitled to proceed directly against such assets. Where, however, the guardian has no right to indemnify against the assets in the business, as where he has acted improperly, neither have his creditors : 35 Mad. 692, Foll. (*B. B. Ghose and Page, JJ.*) RAJARAM SINGH *v.* PANCHA DEOGI. **105 I.C, 255=46 C.L.J. 282= A.I.R. 1927 Cal. 862.**

——*Estate of minor made liable by deed—Question of minor's personal liability does not arise.*

A bond executed by minor's guardian, mother, on his behalf during his minority contained the provision "This bond shall bind my estate and heirs."

Held, that these words indicate that the intention of the executant was not merely to create a personal covenant or to bind the minor by a personal promise to pay, but did indicate the source namely the estate out of which the debt was to be satisfied. (*Kinkhede, A.J.C.*) DULICHAND *v.* MT. SONAI. **90 I.C. 239= A.I.R. 1926 Nag. 75.**

——Money borrowed by guardian for trade of the maternal uncle of the minor is not a necessary purpose and a mortgage by the guardian for it does not bind the minor's estate. (*Spencer and Ramesam, JJ.*) CHUNDURU PUNUYYAH *v.* RAJAM VIRANNA. **70 I.C. 668=15 M.L.W. 427= 1922 M.W.N. 213=45 Mad. 425= A.I.R. 1922 Mad. 273=42 M.L.J. 429.**

—Decree against—Binding nature of.

——*Question of its validity and binding nature depends on pleas taken in any case.*

The mere circumstance that the executant of a document which was purported to be executed both by himself personally and on behalf of certain

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minors, also represented the minors in a subsequent suit, could not be taken by itself to make any decree passed on the basis of the document invalid and not binding upon the minors. The question of validity and binding nature of such decree should be considered having regard to the particular pleas taken in any case : A.I.R. 1929 Mad. 213, Foll. (*Anantakrishna Ayyar, J.*) (CHANDA) PULLAMMA GARU *v.* (JASTI) SATYANARAYANA. **123 I.C. 45= A.I.R. 1930 Mad. 740.**

——Where the guardian *ad litem* of the minor against whom a decree is passed has been guilty of gross negligence and laches in conducting the suit on behalf of the minor the decree so passed can be set aside : 1 Lah. 27 and A. I. R. 1925 Lah 116, Ref. to. (*Zafar Ali. J.*) FAZAL DIN *v.* MAHAMAD SHAFI. **108 I.C. 63=A.I.R. 1928 Lah. 674.**

——*Guardian* ad litem *consenting without applying his mind to its terms—Court will ordinarily relieve minor.*

The rule that a minor is entitled to obtain the avoidance of proceedings undertaken on his behalf if he satisfies the Court that his guardian consented to a decree against him without applying his mind to the question whether the terms of settlement were for his benefit or not, is a rule of prudence, not a rule of law.

However, it is the duty of a guardian in the suit to be at least as vigilant in guarding the interest of the minor as he would be expected to be if his own interests were involved ; and the Court will ordinarily relieve the minor from the effect of a consent decree and give him an opportunity to defend the suit if it is established that the guardian did no more than put his signature to a petition of compromise without considering for himself the question of benefit to the minor. (*Das and Adami, JJ.*). GANGANAND SINGH *v.* RAMESHWAR SINGH BAHADUR. **102 I.C. 449= 6 Pat. 388=8 P.L.T. 730=A.I.R. 1927 Pat. 271.**

——*In the absence of fraud or negligence of guardian or prejudice, decree binds minor.*

No guardian is bound to waste the minor's money in trying to defend a suit in which the defence will not succeed. If it is not proved on the minors' side that minor has been in any way prejudiced by the course that the proceedings took or that there has been any fraud or gross negligence on the part of her guardian the minor is bound by the decree. (*Krishnan and Waller, JJ.*) MALAYYA *v.* PUNNAMMA. **77 I.C. 628=47 Mad. 476=19 M.L.W. 410= 34 M.L.T. 295=A.I.R. 1924 Mad.608=46 M.L.J. 291.**

——The appointment of the Court guardian on a false affidavit that there was no proper relation of the minor to act as next friend is vitiated by fraud and is of no legal effect. The decree in such a suit and the subsequent sale are therefore not binding on the minor. (*Krishnan and Ramesam, JJ.*) (PUPOOTH) RIRICHAND *alias* RAMANUNNI KURUP *v.* VAYISRAVANTH MANAKKAL RAMAN. **74 I.C. 309=17 M.L.W. 558= 32 M.L.T. 107=1923 M.W.N. 301= A.I.R. 1923 Mad. 553=44 M.L.J. 515.**

——*Suit against—Manager of family and minor members — No guardian* ad litem *appointed for minors— Manager represents minors and decree is not a nullity.*

Where there was no formal order appointing the major defendant as guardian *ad litem* of the minor defendants but it was found that the major defendant was the manager of the joint family of which the minor defendants were parties, *Held* : that the major defendant as manager sufficiently represented the members of the family who could not escape their

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liability for the decree passed in the suit on the bare ground that no formal order of appointment of the major defendant as their guardian *ad litem* had been made. (*Kanhaiya Lal, J. C.*) SAT DEO *v.* JAI NATH.

67 I.C. 808=9 O.L.J. 141=A.I.R. 1922 Oudh 75.

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The contention that if a minor on coming of age challenges a decree passed against him on the basis of a compromise even though he does not allege in what manner the compromise is invalid the burden is immediately thrown on the opposite party of establishing that all proceedings in the suit were regular, is a very startling one and not borne out by the authorities. (*Daniels, J.*) RADHA KISHUN SHUKUL *v.* NOKH LAL SHUKUL. **74 I.C. 964=21 A.L.J. 488= 4 L.R.A. Civ. 481=A.I.R. 1923 All. 566.**

—Decree against—Proper representation.

Mother as guardian taking part in proceedings and doing nothing injurious—No formal order appointing her—Minors are properly represented. 30 Cal. 1021 (P.C.), Rel. on. (*Greaves and Muker ji, JJ.*) RANMAYA GAURANGINI *v.* BETTY MAHOBERT. **100 I.C. 177= 31 C.W.N. 160=A.I.R. 1927 Cal. 207.**

——*C. P. Code, O. 32, R. 3—Decree against unrepresented minor is nullity though prejudice not alleged.*

A minor who was unrepresented in the suit by any guardian cannot be held to be bound by the decree passed against him although he neither alleges nor proves that the decree passed against him is unjust or to his prejudice and though he regarded himself as major throughout the whole proceeding. 17 C.W.N. 549, Appr. (Case law discussed.) (*Muker ji and Dalal, JJ.*) MT. CHAMBI *v.* TARA CHAND.

82 I.C. 516=46 All. 744=22 A.L.J. 665= 5 L.R.A. Civ. 502=A.I.R. 1924 All. 892.

——A minor represented by a guardian whose interest is adverse is not legally represented at all. (*Odgers and Hughes, JJ*). SELLAPPA GOUNDAN *v.* MASA NAICKEN. **76 I. C. 1018=47 Mad. 79= 18 M.L.W. 838=33 M.L.T. 126=1923 M.W.N 775= A.I.R. 1924 Mad. 297=45 M.L.J. 675.**

——*Minor alleging non-representation—Court has to go into merits to see if person appointed as guardian is a proper person.*

If a decree affecting a minor is challenged upon the ground that he was not properly represented in the suit in which the decree was passed the Court has to go into the merits and find out if the person appointed as guardian of the minor is the proper person to be so appointed, and enquire into the question, if the minor was prejudiced by the appointment.

Where in a suit on the mortgage, executed by the *Karta* of a joint Hindu family, a minor member of the family was also impleaded and the *Karta* himself was appointed his guardian *ad litem*, and the suit was decreed, on the *Karta* confessing judgment:

Held, the *Karta* is not the proper person to be appointed as guardian of the minor, and that the decree against the minor is a nullity: *Malkar jan* v. *Narhari*, 25 Bom. 337; 30 Cal. 1921, referred to. (*Lindsay and Ryves, JJ.*) MURLIDHAR *v.* PITAMBAR LAL.

66 I.C. 372=44 All. 525=20 A. L. J. 329= A.I.R. 1922 All. 91.

——*Minor represented in the case—Decree cannot be a nullity, though it may be voidable.*

When a minor is a party to the case and the decree is issued against him, unless he has been entirely unrepresented, the decree, so long as it stands, is not invalid, but can, if at all, be only voidable at the instance of the minor. (*Le Rossignol and Campbell,*

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JJ.) INDAR SINGH *v.* PRABHU LAL. **66 I.C. 4= 3 Lah. 88=A.I.R. 1922 Lah. 277.**

—Decree against—Setting aside of.

——*Mortgage—Mortgage suit—Minor—Effective representation—Suit to set aside decree—Sustainability.*

Where in a suit upon a mortgage executed by a Hindu father four of his minor sons were impleaded with the mother as guardian *ad litem* but the plaintiff failed to implead one other minor son and the latter subsequently sued to assert his rights though in the prior suit the suit was contested on behalf of the minors on all possible ground,

Held that the later suit was not sustainable. (*Adami and Wort, JJ.*) RAGHUNANDAN PRASAD *v.* GHANANDAN. **11 P.L.T. 483=A.I.R. 1930 Pat. 521.**

——*Negligence of guardian must result in decision against minor—Reference to arbitration by guardian on usual terms and upon competent legal advice and with Court's sanction is not invalid and the act is not negligent.*

In a suit by a minor to set aside a decree on the ground of the guardian's negligence, it is necessary to show that firstly, the guardian was guilty of negligence, that is to say, of such want of care as was required of him under the circumstances and secondly that such negligence resulted in a decision being given against him.

Thus, where the guardian acting under competent legal advice and with the Court's sanction on behalf of the minors referred the dispute to the arbitration of a sole arbitrator, empowering him to decide the dispute "uko bilmukto," within or beyond the issue as he likes", such expression being commonly used in references filed in Court in these parts, and the arbitrator after arriving at his decision on merits has used his "uko bil mukto" powers (power of awarding lump sum) for the benefit of the minors and the decision with regard to the outstandings is also in favour of the minors.

Held: (a) that the reference to arbitration did no amount to negligence : (b) that the reference is not rendered *ipso facto* invalid by use of the expression "uko bil mukto" within or beyond the issues, (c) that the minors actually benefited by the act of the guardian and cannot succeed. (*Percival, J. C. and Rupchand, A.J.C.*) PHAGUNMAL *v.* TEJMAL.

123 I.C. 301=A.I.R. 1930 Sind. 186.

——*Carelessness of guardian* ad litem *is not sufficient—Gross negligence on his part must be proved.*

The fact that the guardian is either negligent or careless is not sufficient reason to warrant the decree being set aside. It is necessary to establish gross negligence on the part of the guardian of a minor before a decree can be set aside, though it is not every kind of negligence nor every degree of negligence which will render proceedings otherwise regular and proper, liable to be reopened: A.I.R. 1926 All. 36, Rel. on. (*Prideaux, A. J. C.*) KASHIRAM *v.* BALWANT. **108 I.C. 437=A.I.R. 1928 Nag. 207.**

——*Review, not the appropriate remedy.*

A suit to set aside a decree passed against a minor through the gross negligence of his guardian is maintainable and review is not the appropriate remedy : Field, J., in 12 Cal. 69. Diss. from.; A.I.R. 1922 Mad. 273, Foll. (*Phillips and Odgers, JJ*). MOOLASWAMI *v.* TATAYYA. **98 I.C, 787=A.I.R. 1926 Mad. 1079= 51 M.L.J. 389.**

——The failure to put forward a valid defence at the trial is gross negligence. (*Odgers, J.*) SRINIVASA-

MINOR—Decree against—Setting aside of.

CHARLU *v.* MUNIRATHNA NAIDU. 95 I.C. 707= 1926 M. W. N. 350=A.I.R. 1926 Mad. 905.

———*Fraud or collusion only and not merely neglect which is not deliberate can justify setting aside decree.*

Where a decree has been made against a minor duly represented by his guardian and the minor attaining his majority seeks to set aside that decree by a separate suit, he can only succeed on proof of fraud or collusion on the part of his guardian. If the guardian merely neglected to support the case of the minor and there is nothing to show that he did so deliberately, that circumstance alone would not entitle the minor to avoid the operation of the decree. (Case Law discussed). (*Findlay, Offg. J. C.,*) SADASHEO *v.* KARIM. 92 I.C. 241= A.I.R. 1926 Nag. 267.

———*Fraud or collusion is the only ground for setting aside.*

An infant is bound by Judgment as much as if he was of full age, unless gross laches or fraud and collusion appear in the *prochein ami*. In India the procedure in cases of gross laches is to apply for a review, or, if the decree was *ex parte* to get the *ex parte* decree set aside. If it be sought to set aside a decree obtained against an infant, properly made a party and properly represented in the case, and if it be sought to do this by a separate suit, then the plaintiff in such a suit can succeed only upon proof of fraud or collusion. (*Ross and Macpherson, JJ.*) RAJGOPAL ACHARYA *v.* UPENDRA ACHARYA. 96 I.C. 437=5 Pat. 768. A.I.R. 1926 Pat. 528.

———*Hindu Law—Decree against minor—Guardian negligent—Decree will be set aside.*

Where the negligence of the guardian *ad litem* of minor is such as leads to the loss of a right which might have been successfully asserted if the suit had been defended with care, the minor can get the decree set aside even without proof of fraud or collusion ; *e.g.* where the guardian mortgages property for lending money to the maternal uncle of the minor. (*Spencer and Ramesam, JJ.*). CHUNDURU PUNNAYYAH *v.* RAJAM VIRANNA. 70 I.C. 668= 15 M.L.W. 427=1922 Mad. W.N. 213= 45 Mad. 425=A.I.R. 1922 Mad. 273= 42 M.L.J. 429.

———*Guardian—ad-litem.*

A guardian cannot be charged with gross negligence in that he did not foresee that the law would change. (*Spencer and Odgers, JJ.*) ANNAPURNAYYA *v.* VENKATASUBRAMANIAM. 91 I.C. 742= 22 M.L.W. 560=A.I.R. 1925 Mad. 1285= 49 M.L.J. 549.

———*Omission by guardian to defend a suit or to appeal is not necessarily gross negligence.*

Mere failure on the part of the Guardian *ad litem* to defend a suit or to appeal from a decree is of itself not gross negligence, since it is possible, that there may be a good case against the minor and the guardian *ad-litem* might have thought fit not to incur additional expense in defending the suit.(*Scott-Smith, Ag.C.J.*) NAWAB SINGH *v.* GURBAKSH SINGH. 82 I.C. 598=6 L.L.J. 346= A.I.R. 1925 Lah. 116.

———Failure to take wholly untenable objection is no negligence of the guardian. (*Schwabe, C.J. and Waller, J.*) (SIVA) SUBRAMANIA PILLAI *v.* RAKKUMUTHU MOOPPAN. 79 I. C. 418=19 M.L.W. 502= 1924 M.W.N. 454=A.I.R. 1924 Mad. 645.

———Fraud—Plaintiff inducing defendant's guardian to suppress evidence and getting a decree—Decree cannot be set aside by minor. (*Macleod, C. J. and*

MINOR—Decree against—Validity.

Crump, J.) SHRINIWAS SARJERAO SHOLAPURKAR *v.* NARAYANRAO NAVLOJIRAO NIMBALKAR. 76 I.C.551= A.I.R. 1923 Bom. 379.

———*Qualified guardian for minor irregularity in his appointment does not justify setting aside decree unless merits are affected but disqualified guardian renders decree void.*

Where on the face of the record, a person qualified to act as the guardian, appears as a guardian of the minor for the suit, the Court has no power in another suit brought for the purpose of impeaching the validity of the decree, to examine the evidence in order to see whether notices under O. 32, R. 3 (4) were, in fact, served, or whether the person nominated as guardian did consent to act as guardian or whether the Court did expressly appoint such person as the guardian for the suit, unless it is shown that the defect in following the rules has affected the merits of the case.

But where the record, on the face of it shows that the minor was not represented by a guardian for the suit, or was represented by a guardian disqualified, under the express provisions of the statute, from acting as guardian, the position is the same as if the minor were not a party to the suit and the judgment rendered by the Court is without jurisdiction and null and void. (Case-law discussed.) (*Das and Adami, JJ.*) PANDE SATDEO *v.* RAMAYAN TEWARI. 71 I.C. 706=2 Pat. 335= 4 P.L.T. 147= A.I.R. 1923 Pat. 242.

—Decree against—Validity of.

———*Failure to file documents by guardian does not amount to negligence.*

The fact that certain documents were not produced in the former litigation does not necessarily show want of diligence or want of interest on the part of guardian by a minor in the conduct of the former litigation: 13 M.L.J. 68, Rel. on. (*Phillips and Ramesam, JJ.*) VADALAMUDI SASTRULU *v.* VENKATASESHAYYA. 110 I.C. 894= A.I.R. 1928 Mad. 614.

———*Guardian* ad-litem—*Gross negligence or fraud alone can vitiate proceedings by guardian—"Gross negligence"—Culpable neglect prejudicing minor's interest.*

An infant plaintiff is as much bound as an adult by a judgment or order in the cause even though there may have been irregularities in the conduct of it unless there has been fraud or gross negligence on the part of his next friend. The standard of duty of the guardian *ad litem* is that which would be followed by the man of ordinary prudence if he were called upon to act in like circumstances on behalf of himself and his own property. He must do as much to protect the interests of the minor as he would do to protect his own. The nature of the duty demanded from the guardian *ad litem* may vary according to the nature of the case in which he is called upon to act. An omission to defend or to raise a particular plea or to call certain evidence might in the circumstances of a particular case amount to negligence or to a breach of the duty which was owing by the guardian *ad litem* to the infant int hat case. In different circumstances such an omission might not amount to negligence. The thing to be regarded in each set of circumstances is the interest of the minor. The test is whether or not there has been culpable neglect of the interests of the minor ; that is, whether there has been in the conduct of the suit any act or omission on the part of the guardian *ad litem* which in the result has wrought prejudice to the minor's interests. (Case law and authorities reviewed.) (*Lind-*

MINOR—Decree against—Validity of.

say and Kanhaiya Lal, JJ.) BRIJ RAJ *v.* RAM SARUP. **90 I.C. 749=48 All. 44=23 A.L.J. 901=6 L.R.A. Civ. 488=A.I.R. 1926 All. 36.**

——*Omission to rely on a previous judgment for pleading* res judicata, *is not gross negligence of the guardian.*

Where both the lower Courts found negligence merely from the fact that a previous judgment between the parties was not relied upon by the Court of Wards which represented the minor for the purpose of tracing the plea of *res judicata*. *Held*, that there was no gross negligence such as would be sufficient to vitiate the decision against the minor. (*Devadoss, J.*) S. ANANDA RAO *v.* VENKATADRI APPA RAO. **85 I.C. 812=1925 M.W.N. 75=A.I.R. 1925 Mad. 258=47 M.L.J. 700.**

——A decree is not invalid merely because it is issued against a minor. 31 A. 572 (P.C.) Foll. (*Shadi Lal, C. J. and Le Rossignol, J.*) THE LAHORE BANK, LTD. IN LIQUIDATION *v.* GHULAM JILANI, MINOR, THROUGH MT. ZAIWAR NISHAN. **78 I.C. 460=5 Lah. 54=A.I.R. 1924 Lah. 448.**

—Estoppel.

——*Pronote by minor—Misrepresentation as to age—Minor may be estopped from pleading minority.*

If it is proved that the defendant represented to the plaintiff that he was a major, and the plaintiff acting on that representation lent money on the promissory note, then the Court is entitled to consider the question whether in a suit on the promissory note the defendant is estopped from pleading his minority. That, of course, would depend upon the evidence and facts of the case. (*Macleod, C. J. and Shah, J.*) JASRAJ BASTIMAL *v.* SADASHIV MAHADEV WALEKAR. **64 I.C. 457=46 Bom. 137=23 Bom. L.R. 975=A.I.R. 1923 Bom. 169.**

Plaintiff suing to set aside a mortgage-deed on the ground of minority cannot plead his minority if he has practised fraud on the defendant by falsely representing himself to be a major. (*Kincaid, J. C. and De Souza, A.J.C.*) LUNIDOMAL *v.* GHANUMAL. **62 I.C. 237=14 S.L.R. 104.**

—Execution proceedings.

——A minor in whose favour a decree is passed can execute the same at any time within three years of his attaining majority. (16 B. 536 followed.) (*Mirza and Broomfield, JJ.*) RAMKRISHNA *v.* RAMCHANDRA. **38 Bom. L. R. 1093.**

——There is no presumption that it is always for the benefit of a minor to have an execution sale of his properties set aside. (*Wallace, J.*) SHANKAR BHATTA *v.* AYYAPPA GOWDA. **98 I.C. 739=24 M.L.W. 759=A.I.R. 1927 Mad. 151.**

——Non-representation of an infant by a guardian in execution proceedings is not itself a sufficient ground for avoiding an execution sale since such matter stands on a different footing from a case where the provisions of O. 32 of the Code have not been observed in a suit by or against minors. (*Greaves and Mukerji, JJ.*) MATIUR RASUL *v.* ABDUL SAID. **89 I.C. 765=30 C.W.N. 86=A.I.R. 1926 Cal. 109.**

——The defect in the proper representation of the minor in the execution proceedings in that the guardian's consent was not obtained or that the guardian was not duly appointed does not vitiate a sale held in execution where a stranger has purchased the property. (*Mookerjee and Rankin, JJ.*) JINNAT ALI *v.* KAILAS CHANDRA CHOWDHURY. **81 I. C. 870=39 C. L. J. 284=A. I. R. 1924 Cal. 847.**

MINOR—Misrepresentation by.

—Guardian—'ad-litem'.

Where the debt not being antecedent, and the money having been borrowed for the purpose of buying new lands, and the defence that the minors' shares were not liable ought to have prevailed if it had been set up on their behalf,

Held, that the father as guardian showed gross negligence in not setting up this defence. (*Odgers and Hughes, JJ.*) SELLAPPA GOUNDAN *v.* MASA NAICKEN. **76 I.C. 1018=47 Mad. 79=18 M.L.W. 838=33 M.L.T. 126=1923 M.W.N. 775=A.I.R. 1924 Mad. 297=45 M. L. J. 675.**

—Guardianship.

Under Hindu Law married sister is not a guardian and any sale by her of her minor sister's property is absolutely void and can be set aside by the alienee of the minor's heir. The situation of an unauthorised guardian is not bettered by describing him as *de facto* guardian. He may, by his *de facto* guardianship assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it. 34 All. 213 Foll. (*Baker, J.*) PUNJABRAO *v.* ATMARAM. **87 I.C. 1018=A. I. R. 1926 Nag. 124.**

——When the court removes a person from guardianship it is its duty to pass the necessary orders for the adequate perfection of the minor's estate, especially when it is in a bad state of management. (*Mukerji and Guha, JJ.*) KIRANSASI GHOSE *v.* PANCHANAN GHOSE. **34 C.W.N. 986.**

—Insolvency of.

——*Firm carried on for benefit of minor and adult persons can be adjudged insolvent.*

A person under the age of majority cannot be adjudicated as insolvent for failure to pay the debts of a trading firm though he has a right to participate in its property after its obligations are discharged. It does not, however, follow that a trading concern carried on for the benefit of one or more adult persons and a minor may not be adjudicated as insolvent in the firm name in which its business was carried on, and the property of such concern dealt with in the insolvency proceedings for the benefit of the general body of creditors : *Lovell* v. *Beauchamp*, (1894) A. C, 607, Foll. (*Rupchand Bilaram, A. J. C,*) SHAWWALLACE AND CO. *In re.* **97 I.C. 446=21 S.L.R. 280=A. I. R. 1927 Sind 18.**

—Misrepresentation by.

——*Fraud by—He cannot take advantage of it—Where he asks merely to be restored to original position, he must be given relief—Representation to be fraudulent must be without honest belief in it.*

In equity, if an infant be old enough to commit a fraud by inducing others to think that he is of age, he cannot take advantage of it, and, if the Court cannot restore the parties to their original footing, the infant will be bound as if he were an adult. But where the minor has not obtained any property by fraudulent misrepresentation and is merely asking to be put in the position, which he occupied before the transaction this rule will not apply.

It is a question of some difficulty to determine what constitutes a fraudulent misrepresentation by an infant; but it is well established that, allowing another person to deal with him as if he was an adult or doing acts which only an adult can properly do is not sufficient: *Ex-parte* Jones, (1881) L.R. 18 Ch. D. 109, Ref.

The representation must, in order to create the liability, be an express representation.

MINOR—Misrepresentation by.

Where, therefore, a minor simply executes a vakalatnama and files a written statement without making any express representation that he is of age, that of itself does not amount to a fraudulent representation that he is of age.

Again, there may be a false representation which is not fraudulent; for untruth does not of itself import a dishonest mind. Proof of absence of the actual and honest belief is necessary: *Derry v. Peek*, 14 A.C. 337 Ref. (*Das and Adami JJ.*) GANGANAND SINGH *v.* RAMESHWAR SINGH BAHADUR. **102 I.C. 449=6 Pat. 388=8 P.L.T. 730=A.I.R. 1927 Pat. 271.**

———*Burden of proof—Minor appearing and acting like a major*—Onus *is on person alleging minority to prove it.*

It is doubtful whether any heavier burden is laid on the plaintiff than that of establishing that the plaintiff has good reason to believe the alleged minor was of full age. If the minor acted and appeared like a major, the burden of proving minority lies on the party alleging it and presumably basing its allegation on peculiar knowledge. (*Le Rossignol, J.*) DAHARAN SINGH *v.* HARBANS SINGH **A.I.R. 1922 Lah. 75.**

———*Sale—Representing himself to be major—Suit to set aside after attaining majority—Benefit must be refunded in equity.*

In a suit by a plaintiff to recover property which he himself sold on the ground that he was a minor on the date of sale, it was found that, although a definite fraud on the part of the plaintiff was not pleaded, the plaintiff unquestionably did represent himself to be of age when he executed the sale-deed though in fact he was a minor. *Held*: that in a case in which the minor himself as plaintiff invokes the assistance of the Court, it is open to the Court to make the relief conditional on the minor restoring the benefit. (*Daniels, J.C.*) RAGHUNATH SINGH *v.* DHONDE SINGH. **64 I.C. 771=9 O.L.J. 30=24 O.C. 348=A.I.R. 1922 Oudh 30.**

———*Mortgage by—Creditor misled by misrepresentation by minor—Minor can have mortgage set aside on repaying amount borrowed.*

Where a minor, who fraudulently misrepresents to and misleads a creditor as to his age and executes a mortgage to him but subsequently sues for a declaration that the mortgage is void, is entitled to the declaration that the mortgage is not binding on him, but on condition of his repaying the actual amount received by him. [40 A. 558, Rel on.] (*Walsh and Ryves JJ.*) LILA DHAR *v.* PIAREY LAL. **62 I.C. 258=19 A.L.J. 578=A.I.R. 1921 All. 326.**

—Plea of minority.

Where one of the defences to the suit was that the defendant was a minor on the date of the execution of the pronote by the minor, *Held* the *onus* to prove minority is on the defendant who asserts it, (*Daniels and Dalal, JJ.*) NARAIN SINGH *v.* CHIRANJI LAL. **79 I.C. 945=46 All. 568=22 A.L.J. 461=5 L.R.A. Civ. 353=A.I.R. 1924 All. 730.**

———The plea of fraudulent misrepresentation by a minor on the subject of his age cannot be countenanced and the plea of minority would prevail in spite of the minor's fraudulent misrepresentation. The minor, however, cannot seek to set aside the transaction without restoring the benefit that he has received thereunder. (*Moti Sagar, J.*) KAPURA *v.* ARJAN SINGH. **75 I.C. 269=A.I.R. 1923 Lah. 511.**

—Possession by Guardian.

———*Possession presumed not adverse to former.*

Where a guardian is in possession of minor's property a very strong presumption arises that the guardian's possession was taken on behalf of the minor but this presumption is not irrebuttable. (*Ashworth, and Simpson, A. J. Cs.*) THAKUR RUDRA PRATAP NARAYAN SINGH *v.* THAKUR NIRMAN PRASAD SINGH. **74 I.C. 225=9 O.L.J. 552=A.I.R. 1923 Oudh 61.**

—Powers of Guardian.

———*Deed by guardian in his own right—No ratification by minor is possible.*

The principle that where there may be a doubt as to whether the guardian is acting for himself or for his ward, the guardian executant may be deemed to have acted lawfully within the scope and in exercise of his authority does not apply when the document appears to be executed by the guardian in his own right. In such a case no question of ratification arises, for there is no unauthorised act done by the guardian on behalf of the infant which could be ratified, 6 M. I. A. 333 ; 17 I. A. 65, and 17 Cal. 875 Dist. 32 Bom. 386 ; & 15 C. L. J. 332 Foll. (*Mookerjee and Walmsley, JJ.*) ANAND KUMAR DAS GUPTA *v.* DWARKA NATH MANDAL. **80 I.C. 1017=27 C.W.N. 1029=A.I.R. 1924 Cal. 152.**

———*Mahomodan Law*—De facto *guardian cannot deal with minor's property.*

A *de facto* guardian can only deal with the minor's property at his own risk and his acts are like those of any other person who arrogates to himself the power of transferring another's property. He can incur liability but can impose no obligation on the infant. This general rule is subject to certain well-defined restrictions such as acts arising out of the wants of an infant but even in such a case it appears that the guardian is only entitled to deal with the movable property of the infant and cannot pledge or sell the infant's immovable property. 45 Cal. 878, P. C. Foll. (*Ryves, J.*) ABDULLAH KHAN *v.* MAHBUB ULLAH KHAN. **76 I.C. 556=A.I.R. 1923 All. 485.**

—Proof of majority.

———*Plaintiff must prove that he became major within three years of suit.*

It is the duty of the person bringing a suit and claiming exception under Limitation Act, S. 8 to show that he attained majority within three years of the institution of the suit. (*Stuart, C. J. and Srivastava, J.*) MEHDI ALI *v.* WALAYAT HUSSAIN KHAN. **121 I.C. 277=7 O.W.N. 25=A.I.R. 1930 Oudh 97.**

—Suit by.

———*Plaintiff wrongly described as minor and represented by next friend—Suit is maintainable.*

Where in a suit it was through a *bona fide* belief that the plaintiff was described as a minor and was represented by his mother as his next friend,

Held : that inasmuch as the suit was instituted by the right person, though through another purporting to act as his next friend, the suit was maintainable. (*Duval and Mitter, JJ.*) NARAYAN CHANDRA DAS *v.* DUAL CHANDRA DUTTA. **100 I.C. 469=A.I.R. 1927 Cal. 477.**

———*Suit by minor for setting aside sale—Major portion of consideration found for legal purposes—Sale should be upheld.*

To disturb a *bona fide* purchaser who has reason to believe after a lapse of considerable time that his title is secure is a serious thing to do and is really a serious menace to the peace of people's minds.

Where a minor sues after attainment of his majority to set aside the sale by his guardian, and a substantial amount or the major portion of the consideration has been found to be for necessary purposes, the rule is to uphold the sale: (1914) 1 M.L.W. 877; (1915) M.W.N. 8; (1916) 1 M.W.N. 163, and (1921) M.W.N.

MINOR—Suit by.

715, Foll; (1919) 41 All. 63; (1922) 44 All. 683; (1923) 45 All. 429 and (1924) 46 All. 534, Not Foll. (*Odgers, J.*) PHAKIRU PANIGRAHI *v.* KOTAPALLI CHENDRASEKHARAM. **99 I.C. 681 = 1926 M.W.N. 956 = A.I.R. 1927 Mad. 215.**

——*Suit by minor's guardian to recover property from vendee sold in excess of that sanctioned by Court dismissed—Fresh suit by minor after majority is not barred.*

Where a portion of a minor's property was sold by his guardian to discharge the debts of his father with permission of the Court but the vendee took possession of an area in excess of the land sold and the guardian, on her behalf and on behalf of the minor, sued the vendee for the excess when the Court refused to adjudicate on the plea, that the sale by the minor's guardian in excess of the land sanctioned by the Court was entirely without authority, on the ground that it had been raised too late and that the plaintiff could bring a separate action upon it and dismissed the suit, and the decision was not appealed against,

Held : that the previous litigation is not binding on the minor and he is not estopped by it from bringing a suit for recovery of the excess land taken possession of by the vendee. (*Le Rossignol and Fforde, JJ.*) LABH SINGH *v.* SHAHBAN MIR. **95 I.C. 342 = 7 Lah. 129 = 27 P.L.R. 310 = A.I.R. 1926 Lah. 289.**

——The minor cannot be made to suffer by the negligence of his guardian and it is always open to a minor to bring a suit claiming property lost through the negligence of his guardian, but it is not open to a guardian *ad litem* to plead his own default in the same suit as that in which he appears. (*Jackson, J.*) PONNUSWAMI GOUNDAN *v.* VELLAYANA ROWTHER. **98 I.C. 172 = 24 M.L.W. 667 = 1926 M.W.N. 771 = A.I.R. 1926 Mad. 1177.**

——*Suit by next friend must be for benefit of minor—Pre-emption suit with view to benefit next friend is not maintainable.*

Where a suit is instituted on behalf of an infant, it should be manifest to the Court that the next friend is likely to conduct the suit for the benefit of the infant : (1833) 2 M. & K. 243 and (1835) 7 Sim. 234, Rel. on.

Where a pre-emption suit was instituted on behalf of a minor by his next friend not for the benefit of the minor but to enable the next friend and his father to acquire the property in suit for themselves :

Held : that the suit was not maintainable. (*Stuart, C. J. and Hasan, J.*) SUMER SINGH *v.* AMAR SINGH. **95 I.C. 254 = 1 Luck. 462 = 3 O.W.N. 494 = A.I.R. 1926 Oudh 406.**

——A minor can sue as a bearer of a Shah jog hundi. (*Macleod, C. J. and Coyajee, J.*) RAMPRASAD SHIVLAL *v.* SHRINIVAS BALMUKUND. **90 I.C. 685 = 27 Bom. L. R. 1122 = A.I.R. 1925 Bom. 527.**

——*Suit by minor against agent appointed by guardian is maintainable.*

A minor can maintain a suit against an agent appointed by his guardian for the benefit of the minor's estate in all cases generally and particularly at least in respect of properties received by the agent and not accounted for to the guardian. 43 Mad. 429 Overruled. (*Coutts-Trotter, C. J., Ramesam, and Wallace, JJ.*) SUYAMPRAKASAM *v.* MURUGESA PILLAI. **81 I.C. 779 = 47 Mad. 774 = 20 M.L.W. 272 = 35 M.L.T. 8 = A.I.R 1925 Mad. 17. = 47 M.L.J. 205. (F.B.)**

——De Facto *trustee—Suit by—Continuation by minor on majority—No ratification.*

Where a minor on attaining majority adopts a suit instituted by his *de facto* trustee, to recover the minor's money, to the extent of executing the decree and obtaining payment, his conduct does not amount to ratification and there is nothing to debar any claim that he may have against the trustee. (*Piggott and Walsh, JJ.*) FAQIR CHAND *v.* NANUG RAM. **74 I.C. 721 = A.I.R. 1924 All. 277.**

MINOR—Transactions in favour of.

——*Promissory note taken by the guardian of minor.*

A suit on a promissory note taken by the guardian of a minor must be instituted by the guardian within three years of its date. S. 6 of the Indian Limitation Act has no application to such a suit. (*Macleod, C. J. and Shah, J.*) VISHNU NARAYAN DEO *v.* KESHAV GAJANAN POTBHARE. **80 I.C. 474 = 26 Bom. L.R. 426 = A.I.R. 1924 Bom. 468.**

——*Previous proceedings by plaintiff's next friend during minority—Subsequent suit by minor.*

Objection under O. 2, R. 2, would not apply to a case where the previous proceedings were taken in the name of a minor by his next friend. The minor could not possibly be prejudiced by a mistake made by those representing him during his minority as his rights to sue in his own person, only come into effect when he attains majority. (*Macleod, C.J., and Shah, J.*) VYANKAT AWACHIT PATIL *v.* ONKAR NATHU CHAWDHARI. **61 I.C. 276 = 45 Bom. 805 = 23 Bom. L.R. 250 = A.I.R. 1921 Bom. 434.**

——*Suit by next friend on minor's behalf but in his own interest—Suit can be dismissed.*

Where it appeared clearly upon affidavit that the action was commenced by the next friend to promote his own views and not for the benefit of the infant, an order can be made summarily and without an enquiry. *Sale* v. *Sale*, (1839) 1 Beav. 586 Foll. (*Sanderson, C.J., and Richardson, J.*) CHANDRA SEKHAR *v.* GANESH CHANDRA. **93 I.C. 904 = 30 C.W.N. 327 = A.I.R. 1921 Cal. 335.**

—Tort by Guardian.

The minor, or his estate would not be responsible even if he had derived benefit from the tort. (*Hallifax, A.J.C.*) SADARAM *v.* R. S. MANNULAL SAO. **64 I.C. 473 = 4 N.L.J. 108 = A.I.R. 1921 Nag. 21.**

——Fraud by guardian against third party—Minor is neither answerable nor can take advantage. (*Robinson, C.J., and Heald, J.*) MAUNG TIN *v.* MA MAI MYINT. **65 I.C. 459 = 11 L.B.R. 83 = A.I.R. 1921 L.B. 63.**

—Transactions in favour of.

——*Sale in favour of minor is not void.*

A sale deed is not void by reason of its having been executed in favour of a person while he was a minor : 40 Mad. 308, Foll. (*Sundaram Chetty, J.*) SUBBA REDDY *v.* GURUVA REDDY. **120 I.C. 77 = A.I.R. 1930 Mad. 425.**

——*Mortgage in favour of minor can be enforced by him.*

Where a mortgage is made in favour of a minor, and the latter has paid full consideration for it, he can enforce the mortgage : 30 Cal. 539 (P.C.), Dist.; 33 Mad. 312, Diss. from ; 40 Mad. 308, Ref.; 33 All. 657 ; 38 All. 62 ; 33 Mad. 312 ; A.I.R. 1924 Lah. 611, Foll.; 13 A.L.J. 185, not Foll, (*Banerji and King, JJ.*) ZAFUR AHSAN *v.* ZOBAIDA KHATUN. **121 I.C. 398 = 1929 A.L.J. 114 = A.I.R. 1929 All. 604.**

——A mortgage in favour of a minor is valid : A.I.R. 1924 Lah. 611 and 40 Mad. 308 (F.B.), Rel. on ; 38 All. 62 and 38 All. 154, Ref. (*Iqbal Ahmad and Sen, JJ.*) BHARATBHAI *v.* JAI NARAIN. **108 I.C. 129 = 25 A.L.J. 1102 = A.I.R. 1928 All. 102.**

——*Sale in favour of minor can be upheld.*

A sale in favour of a minor can be enforced, especially when the consideration for the sale has been paid

MINOR—Transactions in favour of.

in full to the vendor, as, after that the minor is under no further obligation to any one. 30 C. 539 P.C, Dist. 40 M. 308 F.B. Foll. (*Broadway and Campbell, JJ.*) THOKAR DAS *v.* MT. PUTTI. **82 I.C. 96= 5 Lah. 317= A.I.R. 1924 Lah. 611.**

———Sale in favour of minor at the instance of his father is valid, minor personally not being a contracting party. (*Venkatasubba Rao, J.*) GANGAI AMMAL *v.* GOVINDA PADYACHI. **84 I.C. 626=34 M.L.T. 149= 1924 M.W.N. 324=19 M.L.W. 644= A.I.R. 1924 Mad. 544=46 M.L.J. 464.**

———A lease granted to the guardian of a minor acting on behalf of the minor if not proved to be for minor's benefit, is not binding on him. (*Ross, J.*) MT. HAFIZAN *v.* AKHLESWARI PRASAD NARAIN SINGH. **72 I.C. 36=A.I.R. 1924 Pat. 186.**

———*Pro-note in favour can be enforced by him if consideration is not executory.*

A promissory-note payable on demand executed in favour of a minor is not void and could be sued upon when the minor did not subject himself to any detriment by accepting it. The Law does not regard a minor as incapable of accepting a benefit and there is no reason why a minor should not be capable of accepting a pro-note. (*Po Han, J.*) SHARFATH ALI *v.* NOOR MOHOMED. **76 I.C. 810=2 Bur. L.J. 227= 2 Rang 1=A.I.R. 1924 Rang. 136.**

———*Deed of sale in favour of, is valid.*

There is nothing in the law to prevent a minor becoming a transferee of immovable property and a minor in whose favour a valid deed of sale has been executed is competent to sue for possession of the property.(*Prideaux, A.J.C.*) BALAKRISHNA *v.* LAKHU. **68 I.C. 191=A.I.R. 1922 Nag. 239.**

—Miscellaneous.

Although a minor is considered disqualified like females for holding a position of confidence yet a female or a minor heir may by virtue of a special custom or reservation of a right under the terms of a sanad be entitled to hold the office and nominate his deputy or substitute. (*Kinkhede, A.J.C.*) (SHRIMANT KUAR.) LAXMAN RAO BHONSLEY *v.* NARAIN. **99 I.C. 160=A.I.R. 1927 Nag. 162.**

———An appeal in which a respondent is a minor should be deemed to have been filed not on the day on which the name of his guardian is entered in the memo. of appeal, but on the original date of its presentation. 4 All. 37 and 30 All. 55. Foll. (*Zafar Ali and Addison, JJ.*) RALLA SINGH *v.* BISHNA. **93 I.C. 355=7 Lah. 102= 8 L.L.J. 32=27 P.L.R, 106=A.I.R. 1926 Lah. 186.**

The mere want of a formal order appointing guardian *ad litem* in the previous proceedings is no reason *per se* for holding that the minor was not represented at all : I.L.R. 30 Cal. 1021 (P.C.), Foll. (*Findlay, Offg., J.C.*) SADASHEO *v.* KARIM. **92 I.C. 241=A.I.R. 1926 Nag. 267.**

Where the minor on attaining majority made a conscious admission of a pre-existing liability in respect of the debts incurred by his mother during his minority,

Held that the admission dispenses with the necessity of any proof being adduced by the creditor to show taht the debts were binding.

When major portion of the amount borrowed is proved to be due there is no force in the contention that each item has not been proved by the creditor to have been incurred for the benefit of the minor. (*Kinkhede, A.J.C.*) DULICHAND *v.* M. L. SONAI. **90 I.C. 239=A.I.R. 1926 Nag. 75.**

———Joint Hindu family property devolving on a minor by survivorship is covered by S. 2 of Madras

MOGHOLOI BRAHMOTTAR.

Regulation X of 1831. The regulation applies to all minor owners of properties irrespective of their being registered or not. The application of the regulation is not limited to only registered minor owners of property, by S. 63 of Madras Act (II of 1864.) (*Ramesam and Reilly, JJ.*) K. KRISHNA REDDY *v.* T. RAMAKRISHNAYYA CHETTY. **85 I.C. 873= 48 Mad. 288=20 M.L.W. 791= 1925 M.W.N. 49=A.I.R. 1925 Mad. 253= 47 M.L.J. 667.**

———Whenever an adult person deals with a minor through the minor's guardian, it is his duty to see that the transaction is a fair one and that the minor is not prejudiced in any way by any act or omission on his part. (*Spencer and Devadoss, JJ.*) S. PARAMASIVAN *v.* MEENAKSHI SUNDARAM. **73 I. C. 863= 1922 M. W. N. 732=16 M. L. W. 721= A.I.R. 1923 Mad. 96.**

—Per *Das, J.*—When an issue is raised as to minority, an order appointing a guardian is no evidence of minority. (*Dawson Miller, C. J. and Das, J.*) HARIHAR PRASAD SINGH *v.* EDUL SINGH. **2 P.L.T. 11=1921 P.H.C.C. 100= A.I.R. 1921 Pat. 69.**

———The Chief Court of Lower Burma has no special jurisdiction over infants beyond those given under the Guardians and Wards Act. Its powers are those only of a District Court. (*Rigg, J*). HAZARA BIBI *v.* SULEIMAN HAJI MOHAMMAD. **59 I.C. 562=13 Bur. L.J. 86.**

MINORITY,

See (1) HINDU LAW—MINORITY AND GUARDIANSHIP.
(2) MAHOMEDAN LAW—GUARDIANSHIP.
(3) MAJORITY ACT.
(4) MINOR.

MIRASI.

See LAND TENURE—MIRASI,

MIRASI RIGHTS.

See GRANT.

MISAPPROPRIATION.

See PENAL CODE.

MISCARRIAGE.

See PENAL CODE.

MISCHIEF.

See PENAL CODE, SS. 425-440.

MISCONDUCT.

See LEGAL PRACTITIONER.

———By Arbitrator.

See C. P. CODE, SCH. 2, PARA 15.

MISDIRECTION.

See CR. P. CODE SS. 297, 298 AND 307.

MISJOINDER.

See C. P. CODE, O. 1, RR. 9 AND 13.

MISJOINDER OF CAUSES OF ACTION.

See C. P. CODE, S. 99 AND O. 2. R. 7.

MISJOINDER PARTIES.

See C. P. CODE, S. 95 AND O. 1, R. 13.

MISREPRESENTATION.

See (1) CONTRACT ACT, S. 17.
(2) SP. REL. ACT, S. 39.

MISTAKE.

See (1) CONTRACT ACT, SS. 20, 21 AND 72.
(2) SP. REL. ACT, S. 39.

MISTAKE OF FACT.

See PENAL CODE, S. 52.

MITAKSHARA.

See HINDU LAW—TEXTS.

MODIFICATION OF DECREE.

See C. P. CODE, SS. 148, 151 AND 152.

MOGHOLOI BRAHMOTTAR.

See GRANT.

MOHUNT.
See HINDU LAW—RELIGIOUS ENDOWMENT.
MONEY HAD AND RECEIVED.
See LIM. ACT, ART. 62.
MORTGAGE—
See also T. P. ACT, S. 58.
Accession—*See also* T. P. ACT, Ss. 63 & 70.
Accounts—*See also* (1) CIVIL P. C. O. 34, RR. 2 TO 7.
(2) T. P. ACT, Ss. 72 & 76.
Adverse Possession.
Anomalous—*See* T. P. ACT, Ss. 58 & 98,
Assignment—*See also* T.P. ACT, Ss. 54, 130 & 132
Attestation—*See also* (1) EVIDENCE ACT, Ss. 68 & 69.
(2) T. P. ACT, Ss. 58 & 59.
Bai-bil-Wafa—*See* T. P. ACT, Ss. 58 & 98.
Charge—*See also* T. P. ACT, Ss. 58 & 100.
Co-mortgagees—*See* CONTRACT ACT, Ss. 43 & 45.
Co-mortgagors.
Conditional Sale—*See also* T. P. ACT, S. 58.
Consideration—*See also* (1) EVIDENCE ACT. Ss. 102 & 103.
(2) T. P. ACT. S. 58.
Construction.
Contribution—*See also* T. P. ACT, S. 82.
Covenants—*See also* T. P. ACT, Ss. 65 TO 76.
Debt—*See* (1) CIVIL P. C. O. 21 R. 4.
(2) T. P. ACT, S. 58.
Decree—*See also* CIVIL P. C, O. 34.
Deposit—*See* (1) CIVIL P. C. O. 34 RR. 2 TO 7.
(2) T. P. ACT, Ss. 83 & 84.
Discharge—*See also* (1) EVIDENCE ACT, S. 102 & 114.
(2) T. P. ACT, Ss. 58, 62, ETC.
Equitable—*See also* T. P. ACT, S. 58.
Equity of Redemption.
Extinction of Rights—*See* (1) CIVIL P. C. O. 34, RR. 3 (3) & 8 (3).
(2) T. P, ACT. S. 101.
Foreclosure—*See also* (1) BENGAL REGULATION XVII OF 1806.
(2) CIVIL P. C. O. 34, RR. 2 & 3.
(3) T. P. ACT, S. 58.
Forms of—*See* T. P. ACT, Ss. 58 & 98.
Improvements—*See* T. P. ACT, Ss. 72 & 76.
Integrity—*See* T. P. ACT, S. 60.
Interest—*See also* (1) CIVIL P. C., S. 34 & O. 34, RR. 2 TO 8.
(2) INTEREST.
(3) T. P. ACT, Ss. 58, 62, 77, 83 & 84.
Joint Hindu Family—*See* HINDU LAW—
(1) ALIENATION.
(2) JOINT FAMILY.
Keeping alive—*See also* T. P. ACT, Ss. 75 & 101.
Marshalling—*See* T.P. ACT, S. 81.
Merger—*See also* (1) CIVIL P.C., O. 34, RR. 3 (3) & 8 (3).
(2) T. P. ACT, Ss. 75 & 101.
Moveables.
Novation—*See also* CONTRACT ACT, S. 62.
Occupancy Holding—*See also* OCCUPANCY HOLDING.
Penalty—*See also* (1) CONTRACT ACT, S. 74.
(2) T. P. ACT, S. 60.
Personal Covenant—*See also* (1) CIVIL P. C. O. 34. R. 6.
(2) T. P. ACT, Ss. 58, 68, 69.
Personal Liability—*See also* (1) CIVIL P.C., O. 34, R. 6.
(2) T. P. ACT, Ss. 58, 68 & 69.
MORTGAGE—Accounts.
Personal Remedy—*See also* (1) CIVIL P. C. O. 34, R. 6.
(2) T. P. ACT, Ss. 58, 68 & 69.
Prior and Puisne Mortgagee—*See* T. P. ACT, Ss. 74 & 75.
Prior and Subsequent—*See also* (1) CIVIL P. C. S. 11.
(2) CIVIL P. C. O. 34.
(3) T. P. ACT, Ss. 74 & 75.
Priority—*See also* T. P. ACT, Ss. 75 & 101.
Receiver—*See also* (1) CIVIL P. C. S. 51 & O. 40, R. 1.
(2) RECEIVER.
Redemption—*See also* (1) CIVIL P. C. O. 34, R. 1
(2) T. P. ACT, Ss. 60, 74, 75 & 91.
Registration—*See* (1) REGISTRATION ACT, Ss. 17 & 49.
(2) T. P. ACT, S. 58.
Release—*See* T. P. ACT, S. 82.
Rights of Mortgagee.
Rights of Mortgagor.
Shares.
Splitting up—*See also* T. P. ACT, Ss, 60 & 61.
Sub-Mortgagee.
Subrogation—*See also* T. P, ACT, Ss. 75 & 101.
Substituted Security—*See also* (1) HINDU LAW—PARTITION.
(2) PARTITION.
(3) T. P. ACT, Ss. 71 & 73.
Substitution of New Mortgage.
Suit on.
Suit on Mortgage.
Suit Parties—*See also* (1) CIVIL P.C., O. 34. R. 1.
(2) T. P. ACT, S. 91.
Tender—*See* T. P. ACT, Ss. 83 & 84.
Waste—*See* T. P. ACT, Ss. 65, 66, 72 & 76.

Miscellaneous.

—Accession.

———*Grove planted by mortgagee without mortgagor's consent—Mortgagor entitled to it unconditionally.*

Where a mortgagee in possession plants a grove without the consent of the mortgagor, which is not necessary for the preservation of the property and of which separate possession is not possible, the mortgagor is entitled to possession of the grove unconditionally : 22 All. 83, Foll. (*Raza J.*) JAHANGIR *v.* RAM HARAKH. **92 I. C. 262=13 O. L. J. 243.**

—Accounts.

———In a case of a mortgage with possession, part of the profits was to be utilised by the mortgagee in lieu of interest and the balance was to be repaid by him to the mortgagor every year.

Held : that the claim for payment of the surplus profits by the mortgagee to the mortgagor is entertainable in the suit for redemption : A. I. R. 1924 All. 591, Foll. (*Wazir Hasan, J.*) MAHABAL SINGH *v.* B. RAJESHWARI PERSHAD SINGH. **101 I. C. 200= A. I. R. 1927 Oudh 208.**

———In a mortgage bond the principal sum of the money in consideration. of which the mortgage was effected was stated in a definite amount and then provision was made for interest at a fixed rate in respect thereof. Further the mortgagors made themselves liable for increase in the revenue and provision was made for adding the said increase to the mortgage money at the time of redemption. The annual profits were also stated in a certain and definite amount.

Held : that the parties contemplate accounting at

MORTGAGE—Adverse possession.

the time of redemption. (*Stuart, C. J. and Wazir Husain, J.*) ALI NABI *v.* HABIB-UN-NISA.

100 I. C. 802=4 O.W.N. 323=A.I.R. 1927 Oudh 170.

—Adverse possession.

———*Mortgaged property sold to mortgagee—Mortgagee can make his possession adverse though sale is void.*

It is true that a mortgagee cannot make his possession adverse by a mere assertion of title, but where the mortgaged property is sold to him he can do so even though the sale is void as such sale can be taken into consideration for determining the nature of the possession held by the mortgagee : A. I. R. 1921 Mad. 82 ; A. I. R. 1919 P. C. 44 ; A. I. R. 1923 Lah. 495 ; and A. I: R: 1922 Oudh 7, Ref, (*Bhide, J.*) PREM DAS *v.* SARBALAND. **120 I.C. 481=A.I.R. 1930 Lah. 71.**

—*Subsequent sale to mortgagee but not registered—Mortgagee given possession—Possession adverse.*

Where property is mortgaged and subsequently, it is sold to the mortgagee and the mortgagee is given possession of the property but the sale is not evidenced by the registered instrument, the sale gives a starting point for adverse possession in the character of a purchaser, and a suit for redemption cannot be brought after the adverse possession has ripened into absolute ownership. 1922 Oudh 133 Foll. (*Wazir Hasan, A. J. C.*) SHEO NATH *v.* BABU TULASIPAT. **87 I.C. 188= 12 O. L. J. 139= A.I.R. 1925 Oudh 385.**

———*Adverse possession against mortgagor is not adverse to mortgagee.*

Adverse possession against the mortgagor would not operate to the prejudice of the mortgagee. The mortgage being simple, a trespasser's adverse possession which commences after the date of the hypothecation is not a bar to the mortgagee's right to recover the land. 48 Cal. 425, 39 M. 811, Foll. (*Ayling and Venkatasubba Rao, JJ.*) TANJORE PALACE ESTATE BY ITS RECEIVER SUNDARAM IYER *v.* THIYAGARAJ PILLAI. **99 I. C, 831=A. I. R, 1923 Mad. 160= 50 M. L. J. 183.**

———*Mortgagee not entitled to possession is not affected by adverse possession against mortgagor.*

When after a simple mortgage has been granted, a third person commences to acquire title by adverse possession against the mortgagor, the period of adverse possession against the mortgagor cannot operate against the mortgagee while he is not entitled to possession. Adverse possession operates against a mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land. But in the case of the grant of a mortgage by a person previously dispossessed the adverse possession which had commenced to operate against the mortgagor would not by the grant of the mortgage be arrested but would operate equally against the mortgagee. 5 A. 1 (P.C.); 39 M. 811 (F.B.); 44 Cal. 425 ; 23 M. 37 and 4 W.R. (P.C.) 37 Rel. on. (*Adami, J.*) KUNJ LAL *v.* KANHAI MAHTO. **68 I.C. 641= A.I.R. 1923 Pat. 305.**

———*Adverse possession against mortgagee not necessarily adverse to mortgagor.*

Adverse possession can be acquired over limited rights such as those of a mortgagee also, but adverse possession against mortgagee would not of necessity be adverse to the mortgagor. (*Ryves and Gokul Prasad, JJ.*) ABDULLA *v.* SHAMS-UL-HAQ.

43 All. 127=A.I.R. 1921 All. 262.

—Assignment.

———*Transfer of mortgage carries with it all the rights and obligations attached to it.*

The transfer of a mortgage carries with it all the rights and obligations attached to it. The assignee of a mortgage is bound to give credit for all moneys received by his assignor, and if he takes a transfer without enquiring from the mortgagor, he does so at his own risk as regards the state of the account. In the cases of assignments or transfers, the transferees or assignees take subject to the state of account existing between the mortgagors and the mortgagees on the dates of the assignments or transfers and no differentiation in this connexion need be made in the case of a usufructuary mortgagee : 40 Mad. 683, 28 W.R. 128, Foll. (*Findlay, J.C. and Prideaux, A.J.C.*) CHOTESHA *v.* MT. MAKTUM BI.

109 I.C. 195=A.I.R. 1928 Nag. 223.

———*Suit for possession on redemption by assignee from mortgagor—Suit is based on mortgage and not on title and mortgage must be strictly proved, though contest is really between mortgagor and third party, not mortgagee.*

Plaintiff was transferee from the alleged mortgagor. The suit was for possession on redemption of the mortgage. It appeared that the contest lay between the alleged owner and one of the defendants (other than the alleged mortgagee) as to the ownership of the property. But in the plaint no relief was claimed specifically against the defendant referred to, as apart from the mortgage.

Held : that the suit was entirely on the mortgage, as even the nature of the conflict between the alleged mortgagor and the third party defendant mentioned above was not indicated in the plaint. It could not be said that the suit was one for possession by the transferee of an owner against all possible persons who were keeping him out of possession. Hence the mortgage must be strictly proved. (*Dalal, J.*) SHEIKH KARIMULLAH *v.* GUDAR KOERI.

82 I.C. 306=5 L.R.A. Civ. 686=A.I.R. 1925 All. 56.

—Attestation.

———*One attestor dead—Other attestor proving his and deceased's signature—Deed was held duly proved.*

One of two attesting witnesses was dead. The other attesting witness proved not only his signature but also that of the other attesting witness who had signed as such.

Held : that the mortgage document was duly proved, 41 M.L.J. 305, Dist. (*Ramesam and Venkatasubba Rao, JJ.*) MARIMBI *v.* K. SUNDARA RAO.

86 I.C. 791=A.I.R. 1925 Mad. 751=48 M.L.J. 456.

—Charge.

Where a deed provided "We shall pay the aforesaid amount with Rs. 2 per cent. per month as interest within one year, in case of default we shall pay the above amount with interest, in a lump sum, at the time of redeeming the *sir* land and groves, etc., which have been mortgaged by means of a separate mortgage-deed with possession, and the *sir* lands, etc., will not be redeemed without the payment of the aforesaid amount with interest.

Held: that the deed did create a charge on the properties mentioned therein. (*Stuart, C.J. and Raza, J.*) LAL BAHADUR SINGH *v.* RAMESWAR PRASAD.

105 I.C. 581=4 O.W.N. 965=A.I.R. 1927 Oudh 510.

———Clause in a subsequent document that without payment of both the sums no redemption will be allowed, creates a further mortgage or the property is made security for additional debt (*obiter*). (*Sulaiman and Boys, JJ.*) JEUT KOERI *v.* MATHURA KOERI.

90 I.C. 787=24 A.L.J. 125=6 L.R.A. Civ. 628= A.I.R. 1926 All. 171

———*Of future crops is enforceable as an executory agreement and creates valid equitable charge*—Bona

MORTGAGE—Charge.

fide *purchaser without notice of prior charge, protected.*

A mortgage of a future crop neither sown nor cultivated at the time is recognised and enforced in this country as an executory agreement, binding on the parties to the transaction. The transaction is not governed by the Transfer of Property Act or by the Indian Contract Act, in so far as it is neither a mortgage of immovable property nor a pledge of existing moveable property. It is in the nature of an agreement to mortgage moveable property that may come into existence in future and as such it creates an equitable charge which is valid and enforceable. But a *bona fide* purchaser of such property without notice of the prior charge is not liable for the money due on such a charge, for the interest of the charge-holder is more or less of the nature of an equitable interest, which it would be undesirable to enforce against a person who was not a party to the contract and had no notice of the charge. (13 Cal. 262; 10 All. 133; 35 M. L. J. 450, Ref.) (*Kanhaiya Lal, J.*) RAM SARUP *v.* MOHAN LAL. **75 I.C. 816= A.I.R. 1924 All. 833.**

———*Later deed of charge—Redemption of mortgage not to be made unless later charge paid off—Contract is enforceable.*

Where a later deed of further charge explicitly provided that the mortgagor shall not redeem the earlier mortgage without paying off the money due on the later deed and there was a condition of consolidation of later charge with the first mortgage.

Held: The deed consolidating charges is enforceable and the mortgagor is not entitled to redeem the first mortgage without the payment of money due on the later deed. (*Kanhaiya Lal, J. C.*) NANDHLAL *v.* MAHADEO SINGH. **65 I.C. 401=25 O.C. 134= 8 O.L.J. 640=A.I.R. 1922 Oudh 58.**

—Co-mortgagors.

Where one of several co-mortgagors redeems a mortgage, the other co-mortgagors can bring a suit for a redemption against the redeeming mortgagor within sixty years from the date of original mortgage. (*Lindsay and Kanhaiya Lal, JJ.*) SURAT SINGH *v.* UMRAO SINGH. **77 I.C. 113=20 A.L.J. 611= A.I.R. 1922 All 410.**

———Where a sale in execution of a mortgage-decree is set aside on paying the decretal amount by one of the mortgagors, he cannot be said to have a charge on the property as by so paying he cannot be said to have redeemed the mortgage which is already extinguished by the decree. (*Lindsay, J. C.*) RABNATH BAKSH *v.* GANESH PRASAD. **60 I.C. 213= 23 O.C. 334=2 U.P.L.R. (J.C.) 196.**

—Conditional Sale.

———*Executed prior to* 1858—*Term for redemption extending later—Law governing.*

A deed of usufructuary mortgage, executed in 1844 and containing a condition for defeasance if not redeemed within thirty years is governed by the ruling in Thambusamy's case, (1875) L. R. 2 I. A. 241; I.L.R. 1 M. 1 (P.C.) The principle of giving effect to the intention of the parties evidenced by the contract is applicable to all mortgages alike, executed prior to 1858. (1870) 13 M. I. A. 560; (1881) I. L. R. 3 M. 26 and (1881) I.L.R. 4 M. 179 (F. B.), Ref. to. The fact that the term fixed for redemption went later than 1858 is immaterial. 26 I. C. 76, Ref. to. (*Kumaraswami Sastriar and Pakenham Walsh, JJ.*) MAILA RAI *v.* DERAPPA. **59 M.L.J. 234.**

———*Sale—Oral agreement for repurchase—Not a mortgage by conditional sale.*

Where a sale deed of a certain piece of land was

MORTGAGE—Consideration.

executed and the vendee orally agreed not to act on the sale-deed and to allow repurchase if the amount is repaid within two months.

Held: that the transaction does not amount to a mortgage by conditional sale: 39 Bom. 119; 40 Bom. 74 and A. I. R. 1924 Rang. 235, Dist. (*Brown, J.*) MA TOK *v.* MAUNG CHEIK LON. **101 I.C. 204= 6 Bur. L.J. 20=A.I.R. 1927 Rang. 132.**

———A document purporting to be a sale-deed of a house provided for re-sale to the vendor on payment of the price within six years, and further stipulated that the transferor shall be liable to keep the house in repair. This stipulation as to repairs was quite independent of whether the transferor repaid the money within six years or not. It was further provided after the expiry of 6 years the vendor shall have no power to get back the house sold.

Held: that the document constituted a mortgage by conditional sale. (*Daniels, J.*) ABDUR RAHMAN *v.* AHMADULLAH. **98 I.C. 497 (All.).**

———*Limitation Act, Art.* 147—*Mortgagor in possession but failing to redeem—Limitation for a suit by mortgagee for possession as owner begins from the expiry of the year of grace.*

Where a mortgage provided that the mortgagor was to cultivate as tenant and that if the mortgage was not redeemed in four years, the transaction would become a sale, and where on first notice of foreclosure being held invalid, a fresh notice was issued and a suit for possession as owner was instituted by the mortgagee.

Held: that limitation ran from the expiry of the year of grace after the latter foreclosure proceedings: 35 P.R. 1899 and 94 P.R. 1912, Dist. (*Martineau and Zafar Ali, JJ.*) SARDARI MAL *v.* GANGARAM. **93 I.C. 688=A.I.R. 1926 Lah. 302.**

———*Limitation Act, Art.* 147.

(*Obiter*).—There is no time-limit for the foreclosure of a mortgage by conditional sale. (*Martineau and Zafar Ali, JJ.*) SARDARI MAL *v.* GANGARAM. **93 I.C. 688=A.I.R. 1926 Lah. 302.**

———Where the question was as to whether the transfer of certain shares in an Oil Company was by way of security or sale with a clause for re-purchase, the facts that the amount paid by the transferee had no relation to the market price of the shares, but was merely the amount advanced for interest as debt to the transferor, and that the transferor's claim to the dividends in the shares was recognised together with other circumstances, were held to indicate that the transaction was a mortgage and not a sale with a clause for re-purchase. (*Sir Lawrence Jenkins.*) BAIJNATH *v.* VALLY MAHOMED. **86 I.C. 332= 27 Bom. L.R. 787=3 Rang. 106=3 Pat. L.R. 227= 30 C.W.N. 242=6 L.R.P.C. 57=2 O.W.N. 279= A.I.R. 1925 P.C. 75=48 M.L.J. 339 (P.C.).**

———*Notice—Absence of—Effect.*

Where the plaint did not disclose that any demand had been made before the notice was issued nor did the mortgagee at any later stage even assert that he had made such a demand, the omission is a fatal flaw in the proceedings and the court will not presume that all formalities have been duly observed. 16 P.R. 1888; 106 P. R. 1889 Ref. (*Scott-Smith and Harrison, JJ.*) BAKHTAWAR *v.* MOOL CHAND. **67 I.C. 161 (Lah.).**

—Consideration.

———*Validity—Mortgage is valid to the extent of money advanced unless expressly put an end to by mortgagor.*

A mortgage of which the whole consideration is not paid is valid to the extent of money advanced unless the mortgagor has expressly put an end to the mortgage.

MORTGAGE—Consideration.

Where a person mortgages his land in consideration of the mortgagee paying off his debts but later expressly puts an end to the mortgage, the liabilities of the mortgagee to pay the debts of the mortgagor come to an end. The mortgagee having received no benefit or consideration from the mortgagor is not also liable in equity to the creditors of the mortgagor for the payment of debts due by him : 53 P.R. 1916, Rel. on. ; 44 P.R. 1905, Dist. *(Shadi Lal, C.J. and Agha Haidar, J.)* GULAB MAL *v.* SHAHABUDDIN.

31 P.L.R. 239 = A.I.R. 1930 Lah. 549.

———*Suit on—Execution admitted and consideration denied—Onus of proof.*

The rule that when once execution of the document is admitted or proved, *prima facie* the onus of proof of want of consideration is upon the executant of the document or his heirs, is applicable only with reference to executants and persons claiming under them. It cannot be applied as an inflexible rule where the question arises at the instance of persons who are no parties to the original deed or their privies. Nor does the rule apply where there are other suspicious circumstances tending to show the recitals in the deed are false. 1930 M. 251, referred to. *(Anantakrishna Iyer, J.)* MARIAPPA GOUNDAN *v.* PALANIAPPA GOUNDAN. **125 I.C. 68 (Mad.).**

———*If execution is proved, recital is* prima facie *proof of passing of consideration against heir or purchaser from executant.*

If a suit is between the mortgagee and the mortgagor only and the mortgagor admits the document, the onus of proving want of consideration is on him ; but if he does not admit the execution of the document and denies it and therefore denies the whole transaction, the burden of proving execution and the passing of consideration are both on the plaintiff-mortgagee. Generally he discharges his burden by proving execution only and exhibiting the document containing admission by the mortgagor of having received consideration. The moment such a document is proved and exhibited, it is for the mortgagor to rebut the presumption arising out of the recital in it. If further instead of the mortgagor himself the mortgagee has to sue his legal heir who is an infant, there is no greater burden as regards proof of consideration on the mortgagee. In the case of the purchaser from the mortgagee who cannot be expected to admit the execution of the document, if he puts the mortgagee to strict proof of execution and passing of consideration unless in the course of proving the document, certain circumstances have been elicited which throw a cloud of suspicion on any part of the case, the recitals would be *prima facie* proof of the passing of consideration and it is for the purchaser to meet the presumption arising out of the recital : 6 Cal. 268 and 35 I.C. 455 (Spencer, J.), Diss, from ; 6 C.L.J. 659 and 10 A.L.J. 108, Doubted ; A.I.R. 1921 Cal. 435, Dist,; 36 All. 478, Rel. on ; A,I.R. 1924 Cal. 415, Ref. *(Ramesam and Jackson, J.)* RAGHAVENDRA RAO *v.* VENKATASWAMY, **30 M.L.W. 966 = 1929 M.W.N. 752 = A.I.R. 1930 Mad. 251.**

———The acceptance by the mortgagor of the liability of a third person who owes money to the mortgagee and who is consequently absolved by him of that liability is a good consideration as between the mortgagor and the mortgagee. The mortgage amount need not actually pass from the mortgagee to the mortgagor. *(Jai Lal, J.)* RAM RAKHA *v.* ABDUL GHANI, **109 I.C. 723. (Lah.)**

———*Agreement for re-purchase—Consideration.*

Where in an agreement for repurchase no time limit was mentioned and the price at which the property was to be repurchased was also not mentioned : *Held* that the only equitable inference is that market value was contemplated. *(Maung Ba, J.)* MAUNG HLA GYAW *v.* MA MU. **104 I.C. 676 = 6 Bur. L.J. 123 = A.I.R. 1927 Rang. 334.**

———The plaintiffs and defendants were two joint Hindu families who were closely related. The managing member of the defendants joint family had also been taking active part in the business affairs of the other family which had been managed by a woman. The defendant joint family had been indebted to a certain person who had held a usufructuary mortgage of the family properties. The term of the mortgage was coming near its end and the defendants having allowed arrears of the payments due by them to accumulate, the debt had amounted to something like Rs. 45,000. The manager of the defendants' family had negotiated with the usufructuary mortgagee and induced him to accept Rs. 35,000 in full discharge of his debt. A week previous to the date on which payment was made, of Rs. 35,000 to the usufructuary mortgagee the managing member had executed a promissory note for something like Rs. 24,000 to the manager of the plaintiff's family. About a year after the Rs. 35,000 had been paid to the usufructuary mortgagee, the defendants executed the suit mortgage bond in favour of the plaintiffs. In a suit on the bond, it was denied by the defendants that any consideration had passed in return for the mortgage bond. The Subordinate Judge held that because the manager of the defendants' family had stated to the pleader whom he had been inducing to obtain the remission from the usufructuary mortgagee, that the money had belonged to him, the manager had been playing a trick upon his brothers and that the money had really belonged to the joint family.

Held that in a case like this, to proceed on the divergent statements of the witnesses on either side would be most unsafe, and that the Subordinate Judge's view was wrong. From whatever source the balance of the Rs. 35,000 might have come the amount referred to in the promissory note executed by the manager of the defendants' family formed part of the sum paid to obtain the remission from the usufructuary mortgagee and the mortgage bond executed in favour of the plaintiffs' family had only been in consideration of the amount borrowed under the promissory note. *(Mr. Ameer Ali).* ADAPPA *v.* GANDAPPA. **88 I.C. 158 = A.I.R. 1925 P. C. 114 (P.C.).**

———*Mortgagor can sue for unpaid balance of the money secured by the mortgage.*

A mortgagor can maintain a suit for recovering from the mortgagee, the unpaid balance of the money for which the land was mortgaged. There is in such a case an implied contract that the mortgagee is to pay the whole of the mortgage amount. *(Martineau, J.)* IMAN DIN *v.* DITTER. **78 I. C. 445 = A.I.R. 1925 Lah. 174.**

———*If no consideration has passed there is no mortgage.*

The decision in 53 P. R, 1916 does not rule out a defence that the mortgage does not exist because the mortgagee had paid no part of the consideration or that there was no consideration for the mortgage. *(Le Rossignol, J.)* ARJAN SINGH *v.* BAKHTAWAR SINGH. **69 I.C. 414 = A.I.R. 1924 Lah. 381.**

———*Suit on—Execution, proof of—Mortgagor should prove failure of consideration—Purchaser of equity of redemption contesting mortgage—Mortgagee should prove execution and consideration.*

If an action to enforce a mortgage security is contested by the mortgagor and execution is admitted by

MORTGAGE—Construction—Bond.

or proved against him, the onus lies upon him to prove that the recital as to the payment of consideration for the deed which he executed is untrue. When, however, the claim is contested by a stranger who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the *onus* is upon the mortgagee to prove his case.

Where the reality of the mortgage transaction is impugned by the purchaser of the equity of redemption, the burden of proof lies in the first instance on the mortgagee to establish that the deed was duly executed and the consideration was paid. (*Mookerjee and Buckland, JJ.*) KRISHNA KISHOR *v.* NAGENDRA BALA. **66 I. C. 694=34 C.L.J. 333=25 C.W.N. 942=A.I.R. 1921 Cal. 435.**

—Construction—Bond.

———*Bond—Default clause providing for payment along with prior bond—Deed is additional charge.*

A bond called mashrutulrahn provided that if the bond was not repaid on the stipulated date the executant should not be entitled to repay it except along with the original usufructuary mortgage of a previous date, but the amount would be paid at the same time as that mortgage. It was then said that if the mortgagor made any objection to pay, the Mahajan would be able to recover the money from his person and property.

Held: that the deed was one of mortgage by way of additional charge: A.I.R. 1922 All. 174, Foll. (*Daniels and King, JJ.*) MT. DAULAT BIBI *v.* GAJADHAR PRASAD SINGH. **96 I. C. 555, (All.)**

—Construction—Discharge.

———*Direction to pay certain sum towards prior mortgage—Effect.*

Where a mortgage-deed asked the mortgagee to pay Rs. 600 for previous mortgages and also contained the words that the property mortgaged "is free from all liabilities and charges" *held*, in a suit for declaration that the previous mortgage was discharged by payment of the Rs. 600, that the words cannot be taken to mean that the previous mortgages were fully discharged by the payment of Rs. 600 especially as the previous mortgage-deed was with the mortgagee instead of being destroyed on payment. (*Ryves and Gokul Prasad, JJ.*) S. ALI JAWAD *v.* KULANJAN SINGH. **66 I.C. 131=44 All. 421=20 A.L.J. 247=A.I.R. 1922 All. 262.**

—Construction—Documents.

———*One document should not be construed with reference to another.*

It is dangerous to construe one document with reference to another. Every case must be decided on a construction of the document in dispute together with any admissible extraneous evidence as to the circumstances which may be available. (*Daniels, J.*) ABDUR RAHMAN *v.* AHMADULLAH. **98 I. C. 497.**

—Construction—Elements.

An important test to apply when a question is raised whether a transaction is a mortgage or not is to see whether any interest is to run upon the money due by one party to the other in consideration of which the transaction is entered into. (*Das and Adami, JJ.*) KRISHNA KISHORE ADHIKARI *v.* KUSUNDA NYADI COLLIERIES LTD. **65 I. C. 673=A. I. R. 1922 Pat. 36.**

—Construction—Intention.

———*Real intention to be looked to.*

The High Court ought to look to the intention of the parties as expressed in the mortgage-deed and the real nature of the transaction and must not be guided merely by an expression which may have wrongly or

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loosely been used. (*Jai Lal, J.*) KARAM CHAND *v.* FAQIR SINGH. **A. I. R. 1929 Lah. 489.**

———In a mortgage bond the principal sum of the money in consideration of which the mortgage was effected was stated in a definite amount and then provision was made for interest at a fixed rate in respect thereof. Further the mortgagors made themselves liable for increase in the revenue and provision was made for addressing the said increase to the mortgage money at the time of redemption. The annual profits were also stated in a certain and definite amount.

Held: that the parties contemplate accounting at the time of redemption. (*Stuart, C. J. and Wazir Hussain, J.*) ALI NABI *v.* HABIBRAM NISA. **100 I. C. 802=4 O. W. N. 323=A. I. R. 1927 Oudh 170.**

———A usufructuary mortgage provided that if owing to the partition or the claim of any person the mortgaged property goes out of the mortgagee's possession, then either the deed will be renewed or the deficiency will be made up from other lands of the mortgagor of the same quality or rental. If the mortgagor fails to make up the deficiency as provided by the deed, the mortgagee will be entitled to have the deficiency made good through Court and the mortgagor shall be liable for costs and damages.

The annual rents and profits of the property were to go towards the payment of interest. The mortgagee lost some lands due to partition but he did not bring any suit for making up the deficiency. Mortgagor brought a suit for redemption.

Held: that the mortgagee could not claim deficiency of profits due to loss of a part of mortgaged property. What was intended by the parties was that the mortgagor must look only to the rent and profits for his interest: A. I R. 1922 Oudh 102; 27 All. 313 and 24 All. 521 (P. C.) Rel. on. (*Raza, J.*) AMJAD HUSAIN *v.* ZAIMUL IBA. **98 I. C. 778=A. I. R. 1927 Oudh 87.**

———*Possessory mortgage and lease by mortgagee to mortgagor—Question of intention whether the documents are to be read together or separately.*

In the case of a possessory mortgage and a lease by mortgagee to mortgagor it is a question of intention whether the two instruments should be read together and be held to constitute a single transaction or they should be taken separately and each regarded as a separate and independent transaction. (*Krishnan and Venkatasubba Rao, JJ.*) FRESSA MENON *v.* ABDUL RAHIMAN. **97 I. C. 941=A. I. R. 1926 Mad. 1061=51 M, L. J, 378.**

———*Mortgage—Clause regarding payment of arrears of revenue, at time of redemption—Interpretation.*

Under the terms of the mortgage the mortgagor was to be liable at the time of redemption to pay to the mortgagee all sums due in respect of arrears from the tenants.

Held: that the intention of the parties was that the mortgagor should pay up the arrears to the mortgagee when the latter vacated the possession and that he in turn was to acquire the right of realizing the arrears from the tenants after he himself had been put into possession after redemption, but this claim does not include payment in lieu of time barred decrees obtained by the mortgagee against tenants. (*Lindsay and Kanhaiya Lal, JJ.*) GHASI RAM *v.* BHOLA NATH. **79 I. C. 314=21 A. L. J. 886=5 L. R. A. (Civ) 1=46 All, 115=A. I. R. 1924 All, 153.**

MORTGAGE—Construction—Intention.

———The same property was mortgaged thrice to the same person and the third mortgage contained a clause as follows :—

"For the mortgage-money the shop is to be considered mortgaged. I shall continue to pay interest at the rate of Re. 1 per cent. per mensem and after paying off in one year the principal money due under the previous mortgages and the present mortgaged together with interest, I shall get the mortgaged shop redeemed, otherwise after the expiration ofthe stipulated period, I shall deem the shop as sold in lieu of the entire money. The mortgagor will continue to be liable for repairs as before :"

Held, that the intention of the parties was that the relation of mortgagor and mortgagee should cease on the expiry of the period fixed for payment and that the mortgagees should become the the absolute owners of the mortgaged property.

Interest therefore ceased to run after the expiry of the stipulated period. (*Broadway and Abdul Raoof, JJ.*) MUNSHI LAL *v.* TEJ RAM.

63 I. C. 533 (Lah.)

—Construction—Interest.

———*Stipulation for interest—Rent note simultaneously passed—Mortgage deed wehther need be construed with reference to rent note—Provision for interest for intercalary months—Enforceability.*

The mortgage deed stipulated for repayment at the end of six years and provided that interest should be reckoned according to the vernacular months taking into calculation any intercalary months. The mortgage-deed also referred to the passing of a rent note between the parties, and to the adjustment of rent towards interest. It appeared that the rent note provided for payment of rent according to the calendar month. *Held*, that the mortgage deed was not to be construed with reference to the rent note and that the mortgagor was bound to pay interest for the intercalary months. (*Kemp, A.C.J. and Murphy, J.*) MANI LAL *v.* CHANDU LAL. **32 Bom. L.R. 424.**

———*Mortgage—Interest payable annually—Period seven years—No clause about interest after period—Interest payable.*

The mortgage deed provided that interest would be paid every year during the fixed period of seven years and in case of default the mortgagee would enter into possession, and that there would be redemption after the period of seven years. There was no express covenant in the document which specifically stated that interest would be recoverable even after the period of seven years had expired. On the other hand, there was no clear recital which would show that no interest after that period would be due.

Held, that in the absence of any express recital to the contrary it must be presumed from the terms of the document that subsequent interest was contemplated and that the mortgagors were liable for the same : 19 All. 39 (P.C.) and A.I.R. 1923 All. 7 Rel. on. (*Sulaiman and Kendall JJ.*) HARI RAM *v.* GOKUL PRASAD. **A.I.R. 1930 All. 624.**

———*Mortgage—Money—Meaning.*

Where a deed provided that interest on the principal sum would be paid every year and in default compound interest would be paid and on payment of the mortgage money the mortgage would be redeemed, the term mortgage money did not include the interest on the principal sum lent. (*Chevis and Abdul Raoof, JJ.*) NATHA SINGH *v.* GANGA RAM. **60 I.C. 490 (Lah.)**

—Construction—Kanom.

———*Deed mentioning permanency of mortgagee's right but fixing amount of kanom, and also of adimayavana right—Deed was held to be mortgage.*

MORTGAGE—Construction—Mortgage-deed.

Plaintiff sued for redemption of the suit land on the footing of an ordinary kanom. The defence was that the defendants had a right of permanent occupancy in respect of the lands on the ground that they had adimayavana avakasam. The document on which the suit was based made a reference to its being a renewal of a previous kanom. There was further in the document a specification of the exact amount of the kanom. The lands referred to in the document were described as lands in which the defendants had an adimayavana right and the value of the adimayavana right of the defendants was fixed and there was also one other clause in the document, " and further for the arrears of michavaram the kanom shall be liable."

Held : that the so-called kanom could not be held altogether unsubstantial and having no existence whatever ; and the plaintiff's suit for redemption ought to be decreed : 32 I.C. 982 and 7 M.L.T. 188, Dist. (*Srinivasa Ayyangar and Reilly, JJ.*) VASUDEVAN *v.* KANNAN. **110 I.C. 759=A.I.R. 1928 Mad. 1094.**

—Construction—Limitation.

———*Provision entitling mortgagee to recover the whole principal and interest "when required" in case of default irrespective of due date of payment—Mortgagee has an option to call in the whole amount and time runs from date of exercise of option.*

Where a mortgage bond provided "We shall pay before the 22nd January of each year the interest arrived at on the said amount at the rate of ¾ per cent per mensem and pay the principal sum within a period of five years from this date. In default of payment of interest or principal on such due dates, we agree to your adding to the principal sum the interest due each year from the date of default and recovering (the total amount) with interest at the said rate, without regard to the due date for (payment of) principal whenever you require, by proceeding against us and the undermentioned hypotheca.

Held : that the stipulation in question gave only an option to the mortgagee to call in at once the principal amount and interest due on the mortgage bond without reference to the period stipulated for payment, if there was default. A stipulation so worded only gives the mortgagee an option which is open to him to exercise or not as he chooses ; and the time will not run against him unless he exercises the option : 9 L. W. 479 ; 39 Mad. 981 and 22 Mad. 20, Rel. on. (*Wallace, and Thiruvenkatachariar, JJ.*) RANGASWAMY *v.* KUPPUSWAMY. **107 I.C. 650=A.I.R. 1928 Mad. 637.**

—Construction—Mortgage-deed.

———*Subsequent acts of parties modifying terms of mortgage—Effect of such acts is not to alter terms of mortgage-deed.*

A mortgagor executed a mortgage of his parcels of land. Under the terms of mortgage the first parcel was demised by usufructuary mortgage the produce of which was to be appropriated in lieu of interest on the loan. The second parcel was mortgaged to secure any payments made for the protection of the property. The loan fixed upon was Rs. 35,000. Two days later the mortgagor found he required only Rs. 14,000 and not Rs. 35,000 and on mortgagee agreeing that amount only was advanced. Mortgagor entered into possession only of a fraction of the first parcel of land, the modification was not registered, but it was subsequently relied upon to show that part of first property only was mortgaged and there was no mortgage of all the properties.

Held : that the effect of modification was not to limit security to the fraction of property entered into by the mortgagee and that there was a valid subsist-

MORTGAGE—Construction—Mortgage-money.

ing mortgage of both the parcels of land and the only effect of reduction was that the mortgagee entered into possession of the fraction instead of whole in lieu of interest : A. I. R. 1914 P.C. 27, Dist. (*Ross and Chatterji, JJ.*) KANTA SINGH *v.* CHATURBHUJ SINGH.

120 I. C. 17=8 Pat. 585=A.I.R. 1929 Pat. 664.

—Construction—Mortgage-money.

Mortgaged property sold—Mortgage money left with vendee for payment to mortgagor—No privity of contract between mortgagee and vendee—Vendee is not personally liable. 34 All. 63, Foll.; 34 All. 63 (P.C.); 31 All. 352, 37 All. 115, 41 Mad. 488; 38 Mad. 753, Rel. on. (*Campbell, J.*) MT. CHET KAUR *v.* GURMUKH SINGH. **75 I.C. 940=A.I.R. 1923 Lah. 459.**

—Construction—On merits.

———*Mortgage deed—Redemption without paying interest.*

Where there was nothing in the deed which made it obligatory on the mortgagor to pay interest as a condition precedent to redemption. *Held* that every case of this sort must be decided on its own merits. (45 P. R. 1913, Ref.) (*Scott-Smith, J., on difference between Martineau and Harrison, JJ.*) JAWALA SINGH *v.* TEJA SINGH. **71 I.C. 801=A.I.R. 1924 Lah. 273.**

—Construction—Period.

Mortgage-deed providing that debt would be paid "by 15 years' time" by seven instalments—"By 15 years' time" meant "before expiry of 15 years" and redemption suit before 15 years was not premature. A.I·R. 1914 P.C. 36 ; 27 M.L.J. 483, Dist. ; 39 Cal. 828, Ref. (*Waller and Madhavan Nair, JJ.*) SIMON *v.* RANGAYYA NAIDU. **118 I.C. 105=A.I.R. 1929 Mad. 339.**

—Construction—Personal covenant.

Where in a suit on mortgage the consideration money was paid and there is nothing in the document to show that the agreement to pay was qualified in its terms, or that there was any idea of substituting a remedy against the property for the initial liability to repay the loan.

Held : that the plaintiff is entitled to a decree against the properties for the amount of money lent with the interest due. 4 C.L.J. 510, Foll ; 16 Cal. 540, 10 Cal. 740, 22 Cal. 434, Dist. (*Robinson, C. J. and Duckworth, J.*) QUAT CHENG GWAN *v.* MAUNG P MYI.

66 I.C. 589=11 L.B.R. 148=A.I.R. 1921 L.B. 34.

—Construction—Possession.

———*Construction—Possessory mortgage — Mortgagor to discharge debt in Jeth—Mortgagor not taking such steps towards redemption is not entitled to interest from date of suit up to delivery of possession.*

Where the mortgage was one of those possessory mortgages in which the mortgagees are only liable to surrender possession if everything was done by the mortgagors to discharge the mortgage debt by Jeth Sudi Puranmashi :

Held : that in a mortgage of this kind the mortgagee can only be called upon to vacate possession in favour of the mortgagors if all steps necessary to redemption have been taken so as to enable the mortgagee to vacate possession in the fallow season of Jeth. If in one particular year the mortgagor fail to take all the necessary steps to obtain redemption in the fallow season, the mortgagee is entitled, under the terms of the mortgage, to remain in possession till the fallow season of the following year, and it could not, therefore, be said that where the plaintiffs have made default in taking proceedings for redemption in one year the mortgagee is for the year which follows in wrongful possession. On the contrary he is in possession in strict accordance with the terms of the mort-

MORTGAGE—Contribution.

gage contract and therefore in such a case mesne profits cannot be allowed from the date of the suit till the date of delivery of possession. (*Mears, C. J. and Lindsay, J.*) GOKUL KALWAR *v.* CHANDAR SEKHAR.

96 I.C. 1=48 All. 611=24 A. L. J. 769=A.I.R. 1926 All. 665.

—Construction—Sale.

———*Mortgage—Clause giving mortgagee the first refusal of the property in case of sale to another—Notice of sale price to mortgagee—Price fictitious—Purchaser cannot redeem.*

Where a mortgage deed provided in Cl. 7 thereof "Agar mabain miyad das sal main fariq doyam kothi mazkur ko bai karunga to us halat men miyad mundarja bala fiskh ho jawegi, magar sharat yehki jis asli qimat par kothi mazkur bai hogi uski itla tehriri miyadi do hafta fariq awwal kokar di jawegi. Agar fariq awwal kothi mazkur kharid karna chahega to us qimat par jis par dusra shakhs asal kharidar hoga awwal badast fariq awwal kothi mazkur farokht ki jawegi, basurat inkar tehriri ya jawab na dena ta miyad fariq doyam digar shakhs ke hath farokht kar sakega aur jo mutalba us waqt ham fariq No. 1 ka wajib-ul-talab hoga woh kul wasul karkar kathi mazkar khali kar di jawegi," and the mortgagor within 10 years proposing to sell the mortgaged property, sent notice to mortgagee and then sold the property to appellant who then sued for redemption, and the redemption was disallowed.

Held that on the true construction of Clause 7 of the mortgage deed, the appellant-purchaser is out of Court if it be once shown that the real purchase price on the sale by him was different from the nominal amount of Rs. 80,000. (*Viscount Haldane.*) ABDUL AZEEZ *v.* NIADAR MAL. **A.I.R. 1921 P.C. 136.**

—Construction—Tenure.

———*Mortgage or adhlapi tenure.*

One-half of a certain area of land was sold and the vendee was to sink a well it being agreed that the vendor would pay half of the total expenditure incurred on the sinking of the well and the preparation of the ground for cultivation. The vendee was to be in possession of half of the land not sold, and, out of the produce thereof, recover half the expenditure which was payable by the vendor and the vendee was to keep strict accounts of the expenses and income.

Held : that the transaction was a lekhamukhi mortgage and an adhlapi tenure was not created. (*Shadilal, C. J. and Broadway, J.*) DILLU MAL *v.* ILAHI BAKHSH. **101 I.C. 549=28 P.L.R. 123=9 L.L.J. 63=A.I.R. 1927 Lah. 828.**

—Contribution.

———*Two properties—Sale of one subsequent to mortgage—Purchaser not party to mortgage suit—Purchaser under mortgage decree can sue for contribution.*

Where two properties were mortgaged and one of these was sold to another afterwards but the latter was not impleaded in the mortgage suit brought later on, the auction-purchaser under the mortgage decree is entitled to sue him for the proportionate amount of the mortgage money corresponding to the property purchased by him. 19 All. 541; 21 All. 235 and 40 All. 407 (P. C.) Dist. 11 C.W.N. 314. Dissented from. 26 All. 464; 14 A. L. J. 1146, Ref. (*Tudball and Rafiq, JJ.*) MAHADEO RAI *v.* BALDEO RAI.

63 I.C. 504=19 A.L.J. 478=43 All. 539=A.I.R. 1921 All. 301.

———*Money left with mortgagee to be paid to prior encumbrancer—Delay in payment—Mortgagee having to pay in excess cannot claim reimbursement from mortgagor.*

MORTGAGE—Covenants.

Where a subsequent mortgagee, with whom a sum of money is left at the time of the mortgage for being paid to a prior mortgagee, has to pay a larger amount than that left with him owing to his not having offered to pay the prior mortgagee soon after or within a reasonable time he cannot claim reimbursement for the excess paid by him, from the mortgagor. (*Wazir Hasan, A. J. C.*) RAGHUBAR SINGH *v.* SAMDAL SINGH. **61 I.C. 125=8 O.L.J. 23=A.I.R. 1921 Oudh 55.**

—Covenants.

A mortgage-deed of an occupancy holding and two houses provided that there was to be a pure usufructuary mortgage and in the case of the mortgagee's disposition he would be entitled to recover possession with damages calculated at ten maunds per bigha. In the alternative he was to have the right to recover the mortgage money with interest from the date of dispossession at 2 per cent. per mensem. Then followed the third covenant and it was to the effect that the occupancy holding usufructuarily mortgaged, and two houses were to stand hypothecated to secure the principal money and the damages or interest provided for above.

Held : that the main contract being bad in law, the subsidiary covenant should fall with it : A. I. R. 1921 All. 392, Foll.

Held : further, that if, on the other hand, the third covenant be treated as an independent covenant, a claim based on it would be time barred if the suit be brought beyond 12 years of the execution of the bond, for the interpretation of that covenant would be that it was meant to secure only the principal money. That interpretation being put, the limitation would begin to run from the date of the mortgage as no date was mentioned in the deed for repayment of the principal amount. (*Mukerji, Boys and Kendall, JJ.*) BHUSI RAI *v.* GANESH RAI. **103 I.C. 160=25 A.L.J. 793=39 M.L.T. 349=A.I.R. 1927 All. 499 (F.B.).**

—Decree—Absolute.

———*Appeal from preliminary decree for sale—Decree to be made absolute is appellate decree.*

Where in a suit for sale on a mortgage an appeal has been preferred from the preliminary decree, the decree which is to be made absolute is the decree of the final Court of appeal. 39 All. 641 (F. B.), Foll. (*Sulaiman.*) WAHIDALI *v.* DURGA SHANKER. **93 I.C. 223=A.I.R. 1926 All. 343.**

—Decree—Assignment.

———*Right of judgment-debtor to question the consideration for the assignment.*

It is not open to the judgment-debtor in a mortgage suit to raise the question of consideration for the assignment of the decree, though he can plead that the assignment is a nominal transaction. (*Ramesam and Jackson, JJ.*) RAMACHANDRUDU *v.* KRISHNA REDDI. **115 I.C. 829 (Mad.).**

—Decree—Auction-purchaser.

Where a purchaser in execution of a decree passed on a second mortgage purchased the property with full notice of the previous mortgage and subsequently, decree was passed on the first mortgage which expressly declared the puisne mortgagee to be entitled to redeem the property and where this was not done and the property was ultimately sold in execution.

Held: that the purchaser in execution of the decree on the second mortgage could not claim a higher position than the subsequent mortgagee. (*Das and Adami, JJ.*) GAURI SHANKAR *v.* BAHADUR SINGH. **88 I.C. 340=6 P.L.T. 385=A.I.R. 1925 Pat. 605.**

MORTGAGE—Decree—Compromise.

———*Interim alienations bind purchasers in sale in execution of mortgage decree, if interim alienees have not been made parties.*

A mortgagee who sues for the sale of secured properties, if he succeeds, gets the title of the mortgagor as it stood on the date of the mortgage, or transfers that title to the purchaser, free from all interests and liens subsequently created by the mortgagor, provided he makes the owners of such interests or liens parties to the suit, but if he omits to make any of them parties, their rights or liabilities are not affected. Therefore, where the *interim* alienees of the property have not been made parties to the mortgage suit, the purchaser in execution of the mortgage decree takes subject to the *interim* alienations. 19 All. 541 (F. B.) and 30 Mad. 500, Ref. to. (*Kennedy, J. C. and Raymond, A. J. C.*) SIND BANK LTD. *v.* AMERSI DYAL. **78 I.C. 279=17 S.L.R. 281=A.I.R. 1925 Sind 193.**

———*Mortgagee-auction-purchaser stands in no better position as against strangers, than his mortgagors.*

There is no difference between a person who purchases by private treaty and a person who acquires by a sale under a mortgage decree property from the mortgagor. The mortgagee, auction-purchaser stands in no better position against a stranger than the mortgagor himself. (*Dawson Miller, C. J. and Jwala Prasad, J.*) BASANTA KUMARI DASI *v.* BALMAKUND MARWARI. **72 I.C. 912=1923 P.H.C.C. 1=1 Pat. L.R. 338=2 Pat. 277=A.I.R. 1923 Pat. 371.**

———*Prior and puisne mortgagees—Mortgagor entitled to possession at time of both mortgages—Decrees on mortgages—Both mortgagees parties to both decrees—Purchaser under later decree is entitled to possession though decree was on puisne mortgage.*

Per *Sadasiva Aiyar, J.*—What passes to a mortgagee is the right to sell the mortgagor's interest as it stood at the date of the mortgage, subject only to this : that in his suit he must make all subsequent mortgagees parties if he wishes the sale to be free of their incumbrances. 40 Mad. 77, Foll. So where the mortgagor was entitled to the possession of the property both at the date of the first mortgage and at that of the second mortgage, and where both the mortgagees are parties to and are bound by the decrees on both the mortgages, there is a conflict between the rights to possession obtained under the two decrees and under such circumstances, the rights under the later decree must prevail, though relating to the second mortgage, 31 M. L. J. 219, Foll. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) RUKMANI AMMAL *v.* K. NARASIMHA IYER. **63 I.C. 730=14 M.L.W. 85=1921 M.W.N. 487=A.I.R. 1921 Mad. 612=41 M.L.J. 54.**

—Decree—Compromise.

———*Compromise decree charging property could be executed O. 34, R. 14 being not applicable.*

Where a compromise decree was passed in a mortgage suit to the effect that the plaintiff would be entitled to realise the whole amount by taking out execution and that the properties mortgaged shall remain charged under the mortgage.

Held : that O. 34, R. 14 being not applicable the decree could be executed against the property. (*Mookerjee and Newbould, JJ.*) KASHI CHANDRA CHAKRAVERTI *v.* PRIYANATH BAKSHI. **83 I.C. 424=28 C.W.N. 550=A.I.R. 1924 Cal. 645.**

———A valid mortgage compromise decree which entitles the plaintiff to realise the decretal amount by

MORTGAGE—Decree—Costs.

taking out execution requires to be made absolute before execution is taken out. (*Mookerjee and Newbould, JJ.*) KASHI CHANDRA CHAKRAVARTHY *v.* PRIYANATH BAKSHI. **83 I.C. 424=28 C.W.N. 550= A.I.R. 1924 Cal. 645.**

—Decree—Costs.

———*Redemption—Decree of appellate Court—Costs being a charge on property or not depends on interpretation of decree in each case*—Per Daniels, J. —*Construction of decree should accord with Civil P. C., O. 34, R. 7.*

(Per *Mukerji, J.*) it was open to the appellate Court either to pass a personal decree against the unsuccessful party or to make the costs payable out of the mortgage property. In every case it was a matter of interpretation what was intended by the appellate Court.

(Per *Daniels, J.*)—That construction of the decree should be adopted which was in accordance with the law as laid down under O. 34, R. 7 and with the universal practice of the Courts in such cases which directs that the costs of the suit should form part of the sum payable in order to effect redemption. (*Mukerji and Daniels, JJ.*) .SHEODARAHAN SINGH *v.* BENI CHAUDHARI. **87 I.C. 585= 6 L.R.A. Civ. 225=A.I.R. 1925 All. 492.**

—Decree—Effect of.

———*Decree terminates mortgage—Execution barred by limitation—No redemption is possible afterwards.*

If in a suit for redemption the Court finds that the mortgage had been satisfied and that a surplus amount was due to the plaintiff, the decree passed by the Court is really a decree for possession together with a decree for the surplus amount. After the passing of that decree the rights of the mortgagor and the mortgagee become merged in the decree, and the mortgage no longer subsists. The plaintiff's remedy is to take possession by execution of the decree and to realise the surplus by execution. If owing to his laches, he allows his remedy by way of execution to become barred by time it will no longer be open to him to evade the law of limitation and bring a new suit with a view to seek the same relief claiming that the right of redemption continued even after the decree. 18 A.L.J. 1001, Ref. to; and 24 A. 44, Dist. (*Sulaiman, J.*) SURAJPAL SINGH *v.* SAHEB SINGH. **85 I.C. 749=6 L.R.A. Civ. 104= A.I.R. 1925 All. 323.**

—Decree—Execution of.

Save in special circumstances, a Court cannot direct in a mortgage decree that certain items only of the mortgaged properties must be proceeded against in the first instance; the mortgagee is entitled to proceed against all or any of the items he chooses. (*Devadoss and Madhavan Nair, JJ.*) ANANJAPERUMAL KONAR *v.* PICHAMUTHU NADAR. **85 I.C. 394= 20 M.L.W. 968=A.I.R. 1925 Mad. 332= 47 M.L.J. 910.**

———*Execution Court cannot order properties to be sold in particular order.*

The execution Court ought not ordinarily to fetter the discretion of the decree-holder to put to sale whatever property he wished first to sell.

Where subsequent to the execution of a mortgage, a certain portion of the property was purchased by another and where there was a suit on the mortgage and the suit was decreed and in the executing court the subsequent purchaser applied that the items purchased by him should be sold only if the other items were insufficient.

Held : that the question turned on the form of the

MORTGAGE—Decree—Personal decree.

contract between the vendor and the purchaser, namely whether the property was sold subject to the encumbrance or not and as in the present case, it appeared that the sale was subject to the mortgage, there was no ground for interfering with the rights of the mortgagee to sell the property in any order he pleased. (Case law discussed,) (*Mullick and Ross, JJ.*) KHIRODHAR SINGH *v.* GAJADHAR. **91 I.C. 221= 6 P.L.T. 393=1925 P.H.C.C. 164= A.I.R. 1925 Pat. 484.**

———*Preliminary decree—Final decree not formally embodying reliefs granted—Execution.*

Decree-holder is not bound to obtain a fresh decree in proper form to enable him to proceed to realise the mortgage debt by proceeding against properties other than the mortgaged properties merely because the final decree did not include the reliefs granted in the form prescribed by the Code of 1908. (*Walmsley and B. B. Ghose, JJ.*) HAYATUNESSA CHOWDHURANI *v.* ACHIA KHATUN. **74 I.C. 1017=50 Cal. 743= A.I.R. 1924 Cal. 131.**

———*Remedy against property alone given—Decree cannot be executed personally.*

Where a decree only gives the mortgagee a remedy against the mortgaged properties the only way in which the mortgagee can recover his money is by sale of the mortgaged property, if the personal remedy on the money claim against the mortgagor is barred. (*Macleod, C.J. and Coyajee, J.*) HANMANT TIMAJI DESAI *v.* RAGHAVENDRA RAO GURURAO DESAI. **67 I.C. 847=24 Bom. L.R. 410= 46 Bom. 848=A.I.R. 1922 Bom. 237.**

———A direction for an enquiry as to what is the interest of the mortgagor in the mortgaged properties can only be for the purpose of settling the sale proclamation and in no way affects the rights of the mortgage decree-holder to proceed to the execution of his decree. (*Wallis, C. J., Seshagiri Aiyar and Abdur Rahim, JJ.*) NAMBERUMAL CHETTIAR *v.* RAGHAVA CHARIAR. **71 I.C. 390=14 M.L.W. 563= A.I.R. 1921 Mad. 701.**

—Decree—Final.

An application for final decree is a proceeding in a suit and not in execution. Only one such application is permissible and it must be filed within three years of the preliminary decree. (*Wallace and Jackson, JJ.*) ATHMASA ROWTHER *v.* GANESAN. **85 I.C. 808= 35 M.L.T. 131=1924 M.W.N. 884= 20 M.L.W. 954=A.I.R. 1924 Mad. 890= 47 M.L.J. 641.**

—Decree—Interest.

It is unusual in a decree in a mortgage suit to direct that interest should be paid in kind instead of in money.

Where in a mortgage decree the lower court in accordance with the terms of the mortgage deeds directed the defts. to give certain amount of rice to the plaintiff.

Held : that defendants should have an opportunity of tendering the market price of the rice. (*Macleod C. J. and Crump, J.*) SHIVRAO RAMRAO *v.* LAXMIBAI KOM SUBRAO SANTAPPA NAGARKATTE. **76 I.C. 638=A.I.R. 1924 Bom. 523.**

—Decree—Personal decree.

———*Claim on mortgage—Personal decree can be given.*

Where a mortgage was found invalid for want of registration, but the defendant admitted the amount as due, it was open to the Court to pass a decree against its defendant for that amount personally. (*Macleod, C. J. and Coyajee, J.*) CHUNILAL SOMESH-

MORTGAGE—Decree—Preliminary.

WAR *v.* VITHALDAS KARSANDAS. **68 I.C. 1005 = 24 Bom. L.R. 502 = A.I.R. 1922 Bom. 440.**

—Decree—Preliminary.

At the time of the preparation of the final decree the amount fixed in the preliminary decree cannot be altered except for some reason or some event which may have happened subsequent to the preliminary decree : 33 Cal. 613, Dist. (*Mears, C. J. and Dalal, J.*) MITTHU LAL *v.* DEOJIT. **102 I.C. 1 = 49 All. 809 = 25 A.L.J. 591 = A.I.R. 1927 All. 589.**

—Decree—Sale.

———*Decree prescribing condition precedent for sale—Condition is not complied with—Sale is void.*

Where a decree in a mortgage suit prescribes a condition precedent which must be complied with before the sale of the mortgaged property and the property is sold without complying with such condition, the sale is void. (*Mukerji, J.*) ATMA RAM *v.* NANAK CHAND. **92 I.C. 571 = A.I.R. 1926 All. 274.**

———*All the property covered by the mortgage should be put up for sale.*

The decree-holder is entitled to have all the properties mortgaged to him, put up for sale but it is entirely in the discretion of the Court to direct in which order the properties should be sold ; otherwise costs may be thrown away. All the preperties must be advertised for sale and when they are actually brought into execution, and become subject to sale it would be then for the Court to decide on just and equitable principles which property ought to be first sold. (15 C. W. N. 80 at p. 82, Ref.) (*Das and Ross, JJ.*) BHAGWAN CHANDRA DAS *v.* RAI SAHIB DHARAM NARAIN DAS. **84 I.C. 203 = 3 Pat. 962 = 2 Pat. L. R. Civ. 242 = 1925 P.H.C.C. 62 = 6 P.L.T. 392 = A.I.R. 1924 Pat. 802.**

———*Execution Sale—Mortgage decree—What passes is the right, title and interest of mortgagor on date of mortgage.*

Where a lease is granted by the mortgagor after the date of the mortgage, it is not binding on any person who may acquire any rights in the properties in enforcement of the mortgage. An auction-purchaser in execution of a mortgage decree gets the right, title and interest of the mortgagor as on the date of the mortgage and any lease subsequent to the date of mortgage is not binding on him. (*Kanhaiya Lal, J. C.*) MT. BIBI SAIDUNNISA *v.* FAIYAZ HASAN. **69 I.C 97 = 9 O.L.J. 319 = A.I.R. 1923 Oudh 1.**

———A sale in execution of a mortgage-decree conveys the interests of the mortgagor and mortgagee as they were at the date of the mortgage. (*Mookerjee, A. C. J. and Fletcher, J.*) BARENDRA NATH *v.* MARTIN & CO. **62 I.C. 167 = 33 C.L.J. 7 = A.I.R. 1921 Cal. 801.**

—Discharge.

———*Mortgagee purchasing portion of mortgaged property thereby discharging portion of mortgage debt—Mortgagee may sue for balance due.*

The suit was for foreclosure of a mortgage executed on 14-8-1908, claim being for the amount still due on the mortgage after making allowance for a payment of Rs. 9,000 made on 17-10-17. On that date the mortgagor sold a portion of the property and paid the sale proceeds, Rs. 9,000 to the mortgagees towards satisfaction of the mortgage debt. The mortgagor originally agreed to sell the portion of the property for Rs. 9,000 on 9-1-13, and he agreed also that the purchaser might retain enough of the purchase money to pay off the mortgagee. At that time the amount due on the mortgage was less than Rs 9,000. But the defendant mortgagor did not carry out his agreement till he was compelled to do so by a decree for specific performance. The deed was eventually executed on 17-10-1917 by which time the amount was considerably in excess of Rs. 9,000.

Held : the parties intended that the mortgagee should be fully paid off by means of the sale proceeds but not that it should be extinguished by the sale itself, and therefore the mortgagees are undoubtedly entitled to the foreclosure decree for the balance. (*Hallifax, A.J.C.*) NARAYAN *v.* VENKAT RAO. **72 I.C. 422 = A.I.R. 1923 Nag. 213.**

MORTGAGE—Discharge.

———*Sale of property to mortgagee in consideration of mortgage-debt—Subsequent failure of consideration will not revive mortgage.*

Certain property was mortgaged in 1908. The mortgagor sold in 1914 the mortgaged property together with some other property to the mortgagee. The amount due on the mortgage was left by the vendor in the hands of the vendees for the discharge of the said mortgage. However, it happened that at or about the time of execution of this sale-deed, some of the mortgaged property was under attachment in execution of a simple money-decree and was subsequently sold by auction and purchased by a third person subject to the mortgage of 1908 thus causing a failure of consideration for the sale-deed. The mortgagee-vendee, instead of pursuing the remedy for failure of consideration, elected to treat the mortgage as only partially discharged and sued on the mortgage for the balance.

Held : that the mortgage-deed of 1908 had been completely discharged by the execution of the sale deed in 1914 and therefore a separate suit on the mortgage was not maintainable.

The fact that the vendor is unable to convey a good title in respect of the whole of the property purported to be sold by him to the vendee under the sale-deed, and that vendee has not chosen to avail himself of the remedy provided for this contingency in the sale-deed does not in any way affect the question of discharge of the mortgage. (1916) 39 All. 178 distinguished. (*Piggott and Walsh, JJ.*) LACHHMAN PRASAD *v.* LACHMESHWAR PRASAD. **66 I.C. 203 = 20 A.L.J. 151 = A.I.R. 1922 All. 76.**

———*Joint owners—One cannot give a valid discharge without concurrence of others.*

As one mortgagor cannot file a suit for redemption without the concurrence of the other, so also he cannot give a valid discharge without the concurrence of the other. If the word "discharge" is given a wider meaning as including any form of quittance whereby the rights and liabilities between two parties are put an end to, it could be said that the plaintiff seeking redemption gives a discharge, when he pays the mortgage debt and recovers possession of the mortgaged property from the mortgagee, thus putting an end to all rights and liabilities between the parties, so that no further proceedings could be taken. (*Macleod, C. J. and Shah, J.*) BAI KEVAL *v.* MADHU KALA. **64 I.C. 972 = 46 Bom. 535 = 23 Bom. L.R. 1191 = A.I.R. 1922 Bom. 319.**

———*Effect.*

Where the mortgagor pays full amount of the mortgage to mortgagee who has already assigned his interest, the payment amounts to a discharge in absence of collusion. No inference of constructive notice can be drawn by the mere fact that at the time of payment the mortgage-deed was not in the possession of the mortgagee. (*Spencer and Krishnan, JJ.*)

MORTGAGE—Discharge.

NEELAMANI *v.* SUKADUVA. **60 I.C. 25**=
12 L.W. 269=43 Mad. 803.

——A mortgagee who bought a part of the mortgaged property at a low price, because it was sold under the burden of his debt, must be considered to have paid to himself, towards the satisfaction of the mortgage, the difference between the full price of what he bought and the price he paid for it. 24 W.R 83, Foll. (*Hallifax, A.J.C.*) ADKU *v.* RAJA RAM.
64 I.C. 453=A.I.R. 1921 Nag. 96.

—Equitable.

——*Priority sections of the T. P.Act apply to equitable, mortgages also.*

Equitable mortgage effected by deposit of title deeds is a mortgage in the sense of the Act and consequently the priority sections do apply, for unless the deposit of title-deeds effects the transfer of an interest in a specific immovable property for the purpose of securing the payment of money advanced or to be advanced, it is absolutely nothing at all. Further the concluding words of S. 59 actually use the word mortgage to denote the security effected by delivery of documents of title. (*Lord Dunedin,*) IMPERIAL BANK *v.* U. RAI G. T. & Co. **76 I.C. 910**=
33 M.L.T. 395=1923 M.W.N. 609=
51 Cal. 86=1 Rang. 637=
50 I.A. 283=2 Bur. L.J. 254=
21 A.L.J. 784=25 Bom. L.R. 1279=
39 C.L.J. 186=28 C.W.N. 470=
A.I.R. 1923 P.C. 211=45 M.L.J, 505 (P.C.).

——A mortgagee in Bombay is not bound to deliver possession of the title deeds, or to produce them for the inspection of the mortgagor until actual tender or payment of the principal, interest and costs. 5 Bom. H.C.R. (O.C.) 152, 155, 157 Ref. (*Mulla, J.*) K. C. MEHTA *v.* CASSUMBHAI KESHAVJI. **75 I.C. 193**=
24 Bom. L.R. 847=A.I.R. 1922 Bom. 433.

—Equity of Redemption.

Mortgagees, whose mortgages are not usufructuary, cannot resist a suit for possession by a purchaser of the equity of redemption: A.I.R. 1926 All. 734, Affirmed. (*Lord Carson.*) BIJAI SARAN SAHI *v.* RUDRA BAGESHWARI PRASAD. **120 I.C. 650**=
30 M.L.W. 604=1929 M.W.N. 827=51 C.L.J. 70=
32 Bom. L.R. 144=A.I.R. 1929 P.C. 288 (P.C.).

——A mortgage by a mukararidar is not extinguished on the death of the mortgagor without heirs. The proprietor, by virtue of reversion, becomes the owner of the land in whom the equity of redemption vests. (*Coldstream, J.*) RAM LABHAYA *v.* KARTAR SINGH.
99 I.C. 962=8 L.L.J. 594=28 P.L.R. 41=
A.I.R. 1927 Lah. 75.

——*Purchase of.*

Where the mortgagor sells his equity of redemption, and the purchaser agrees to pay off the mortgage money to the mortgagee, the mortgagee being no party to the agreement, cannot enforce the agreement against the purchaser and get a personal decree for the mortgage money: 34 All. 63 (P. C.) and A.I.R. 1923 P.C. 54, Foll. (*Bucknill and Foster, JJ.*) ACHUTA RAM *v.* JAINANDAN TEWARY. **96 I.C. 281**=
5 Pat. 468=7 P.L.T. 724=1926 P. H.C.C. 327=
A.I.R. 1926 Pat. 474.

——*Purchase.*

On the facts *held* that the purchaser of equity of redemption did not become personally liable to the mortgagee to discharge the mortgage debt. (*Lord Atkinson,*) NANKU PRASAD *v.* KAMTA PRASAD.
95 I.C. 970=26 C.W.N. 771=3 P.L.T. 637=
A.I.R. 1923 P.C. 54 (P.C.).

——*Clog.*

A stipulation that the mortgage is not to be redeemed with borrowed money, though itself unenforceable does not invalidate the mortgage as a whole. (*Daniels A.J.C.*) SAIYID ZULFICAR ALI *v.* SURAJ PRASAD.
68 I.C. 998=9 O.L.J. 365=A.I.R. 1922 Oudh 221.

MORTGAGE—Improvements.

——*Purchase.*

A purchase of the equity of redemption by a mortgagee is valid and puts an end to the right of the mortgagor. (*Dawson Miller and Adami, JJ.*) BALDEO SINGH *v.* MEGHU SINGH. **74 I.C. 202**=
(1919) P.H.C.C. 386.

—Foreclosure.

——*Foreclosure decree in* 1875—*Mortgagee put in possession few days after—Redemption suit after* 45 *years.*

A foreclosure decree in the English form was passed in 1875 to the effect that if the mortgagor failed to pay within six months the mortgage amount he will stand absolutely debarred and foreclosed of and from equity of redemption. The mortgagor gave up possession to the mortgagee some years after. The mortgagee and those claiming through him remained in unchallenged possession for 45 years and expended large sums in improving the property. A suit for redemption was brought in 1921.

Held: that the mortgagor acquiesced in the position that the mortgagee was entitled to hold them as his own and that it was no longer necessary for the latter to execute the foreclosure decree. A mortgagor seeking to redeem after a foreclosure decree was bound to do so within a reasonable time, and was not entitled to wait for more than 45 years. (*Sir John Wallis*) KESHAVRAO VENKATRAO *v.* NANABHAI SADANAND.
114 I.C. 574=31 Bom. L.R. 696=29 M.L.W. 472=
49 C.L.J. 315=6 O.W.N. 299=33 C.W.N. 402=
A.I.R. 1929 P.C. 61 (P.C.).

——*Foreclosure decree—Mortgagee getting possession before date of payment—Acquiescence of mortgagor—Effect.*

If after a preliminary decree for foreclosure has been passed the mortgagee enters into possession before the day appointed for payment has arrived, the mortgagor would certainly have a right to demand a fresh account and the appointment of a further day for payment; but if he allows many years to pass before making his application, it must be considered that he acquiesced in the mortgagee holding the property as his own and induced him to believe that it was no longer necessary either to execute the decree he had obtained or to obtain an order absolute for foreclosure. (*Macleod, C. J. and Coyajee, J.*) VASANTRAO *v.* NANABHAI. **94 I.C. 96**=
28 Bom. L.R. 347=A.I.R. 1926 Bom. 273.

——A decree absolute for foreclosure is closely akin to auction sale. (*Pullan, A. J. C.*) BADRI NATH *v.* RADHABALLABHRAJJI. **86 I.C. 622**=
A.I.R. 1925 Oudh 199.

—Improvements.

——*South Canara—Warg lands to which right of holding kumki lands attached—Usufructuary mortgage of—Improvements by mortgagee—Right on redemption to—Contract to the contrary—When to be implied.*

In a case of a usufructuary mortgage of warg lands in South Canara to which the right of holding kumki lands is attached, when the warg lands and the kumki lands are both put in possession of the mortgagee and he effects improvements on both, he can on redemption claim the value of improvements on the kumki lands as well as those on the warg lands. The kumki is for the purposes of redemption and the rights of the parties on redemption to be regarded as part of the security. An agreement in the deed of mortgage

MORTGAGE—Improvements.

for the payment to the mortgagee on redemption of the value of the improvements effected by him on the warg property does not imply a contract to the contrary in respect of the kumki. (*Beasley, C.J, and Krishnan Pandalai, J.*) VASTEVA HOLLA *v.* MAHABALA RAO. **125 I.C. 530=A.I.R. 1930 Mad. 674=31 M.L.W. 534=58 M.L.J. 575.**

———Where a deed of usufructuary mortgage provided that the mortgagor shall pay the cost of "*murrammat shikast rekht*" with interest.

Held : that the mortgagor shall pay nct only for the ordinary repairs but also the expenses reasonably incurred in rebuilding the whole or a portion of the house mortgaged together with interest : A.I.R. 1921 Lah. 238 Foll. (*Shadi Lal, C. J. and Jai Lal, J.*) KHARATI RAM *v.* DINA NATH. **103 I.C. 466=28 P.L.R. 371=9 L.L.J 296=A.I.R. 1927 Lah. 815.**

———*Purchaser in execution of prior mortgage-decree—Suit by puisne mortgagee for sale—Purchaser cannot claim improvements.*

The auction-purchaser in execution of a decree on the first mortgage to which the second mortgagee was not a party, cannot claim the amount spent by him on improvements as payable before the second mortgagee, who in a suit on his mortgage could bring the property to sale. (*Ryves and Gokul Prasad, JJ.*) BUDHI LAL *v.* ADMINISTRATOR-GENERAL OF MADRAS. **65 I.C. 841=44 All. 418=20 A.L.J. 216=A.I.R. 1922 All. 104.**

—Interest—Cessation of.

———*Interest runs in absence of contrary contract.*

Where there is no provision in the mortgage deed that interest would cease to run after expiry of a certain period the ordinary presumption is that money was lent and interest was agreed to be charged all along. 19 All. 39; 20 All. 171, Foll. 11 A.L.J. 829, Dist. (*Lindsay and Sulaiman, JJ.*) BENAIK RAO *v.* PULAIN SINGH. **79 I.C. 69=5 L.R.A. Civ. 335=A.I.R. 1924 All. 929.**

———*Time for payment fixed—Covenant to treat mortgage as absolute sale on default—Interest does not cease to run at the end of period.*

Where the mortgagor agreed to pay the mortgage money within a fixed period and in case of default, the mortgagee was to treat the transaction as an absolute sale, *held* that interest on the mortgage money will not cease to run by reason of the covenant from the date fixed for payment. (*Ashworth, J.C. and Simpson, A.J.C.*) SANGAT BUKSH *v.* RAWAT DIJDEO BUKSH. **72 I.C. 263=9 O.L.J. 511=A.I.R. 1923 Oudh 143.**

—Interest—Charge.

———*Interest due, a charge on the estate.*

The general rule is that the mortgagee in the absence of any contract to the contrary, is entitled to treat the interest due under the mortgage as a charge on the estate : A. I. R. 1924 P. C. 183, Foll. (*Wazir Hasan and Raza, JJ.*) RAM RATAN LAL *v.* ADITYA PRASAD. **112 I.C. 481=3 Luck. 459=5 O.W.N. 178=A.I.R. 1928 Oudh 273.**

———*The mortgagee, in the absence of any contract to the contrary, is entitled to the interest due under the mortgage as a charge on the estate—Personal covenant of a mortgage bond providing for interest—Hypothecation clause not expressly referring to interest—Interest was still held to have been secured on the property mortgaged.*

The mortgagee in the absence of any contract to the contrary is entitled to treat the interest due under the mortgage as a charge on the estate : 6 P.L.T. 95, Rel. on.

A zarpeshgi thika patta for a term of five years was granted in consideration of an advance of Rs. 950 carrying interest at 12 per cent. per annum under which interest was to be realized from the usufruct of the property. There was a provision that if the advance be not repaid within the terms of the lease, the land was to remain in possession of the zarpeshgidar until repayment. Then there was a personal covenant by the mortgagor that in case of dispossession of the zarpeshgidar the principal zarpeshgi money with interest from the date of dispossession to the date of realization would be realized from the person and the other properties of the mortgagor. At the end there followed a simple mortgage in these words : "In security of the zarpeshgi money we mortgage the zarpeshgi properties with the zarpeshgidar." The mortgagor sued to redeem the property. The mortgagee claimed interest.

MORTGAGE—Interest—Charge.

The lower Court held that as there was no mention of interest in the last clause, the defendant was entitled to redeem without payment of any interest,

Held : that interest had been secured on the property mortgaged. The mere fact that there was an express reference to interest in the personal covenant and no express reference to interest in the hypothecation clause was not evidence of a contract not to make interest a charge on the property : 6 P. L. T. 97 (P. C.) Rel. on. (*Dawson Miller, C. J. and Ross, J.*) RANG RAJ SINGH *v.* SHEONARAINLAL. **110 I.C. 594=9 P.L.T. 785=A. I. R. 1928 Pat. 398.**

———In the absence of contract to the contrary, a mortgagee is entitled to treat interest due under a mortgage as a charge on the property : A. I. R. 1924 P. C. 183 and A. I. R. 1926 Lah. 624, Foll. (*Shadilal, C. J. and Jai Lal, J.*) SHEO RAM *v.* MUNRAJ. **103 I.C. 124=28 P.L.R. 377=A.I.R. 1927 Lah. 850.**

———A mortgage is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary. A. I. R. 1924 P. C. 183, Foll. (*Tekchand and Agha Haidar, JJ.*) BADHAWA RAM *v.* AKBAR ALI. **103 I.C. 752=9 L.L.J. 428=A.I.R. 1927 Lah. 817.**

———A deed of usufructuary mortgage provided that interest was to be at the rate of 1½ per cent. per mensem, and, after providing for deducting the rent of Rs. 12 received, it went on : "As soon as you make a demand for the total amount at any time we shall pay it forthwith."

Held : that interest also was a charge on the profits. (*Phillips, J.*) P. V. ARUMUGAM *v.* M. MUTHIAH CHETTY. **99 I.C. 223=A.I.R. 1927 Mad. 1156.**

———*Interest is charge on mortgage property.*

A mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary and it is most important that this general rule should not be shaken in any particular : A. I. R. 1924 P. C. 183 Foll. A. I. R. 1924 Lah. 273 not Foll. being considered as overruled by A. I. R. 1924 P. C. 183. (*Campbell, J.*) LADHA SINGH *v.* SUNDAR SINGH. **92 I.C. 762=A.I.R. 1926 Lah. 530.**

———*Provision for redemption on payment of principal only—Interest payable annually with default clause for sale—Interest not a charge—Discretion of Court.*

When in a mortgage-deed, the payment of interest was recited as an obligation to be met by the mortgagors yearly and in case of default it was provided that the mortgagees could bring the property to sale at any time in order to recover their principal and interest and it was also provided, that the mortgagors were to redeem by paying the principal only.

MORTGAGE—Interest—Charge.

Held, that, legally the mortgagors were entitled to redeem on payment of principal only and the interest was a charge only in the sense that it could be recovered by a suit for sale. (A.I.R. 1922 Lah. 254, Dist.)

But in order to avoid delay to mortgagee by a second suit for interest, the Court exercised its powers in equity and held that, the mortgagors would be entitled to redeem on payment of principal and interest for 12 years, notwithstanding the clause in the mortgage deed to the contrary. (*Harrison and Raoof, JJ.*) RAMJI LAL *v.* MINSHI LAL, **79 I.C. 24= A.I.R. 1925 Lah. 182.**

———In the absence of express condition in the mortgage deed that interest will not be a charge upon the property mortgaged, the interest is a charge upon the property. (*Moti Sagar, J.*) BANWARI LAL *v.* KALLU KHAN. **82 I.C. 622=6 L.L.J. 331= A.I.R. 1925 Lah. 113.**

———The mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under the mortgage as a charge on the estate. (*Lord Dunedin.*) GANGA RAM *v.* NATHA SINGH.

80 I.C. 820=6 P.L.T. 97=29 C.W.N. 558= 22 A.L.J. 688=20 M.L.W. 101=26 Bom. L.R. 750= 1924 M.W.N. 599=35 M.L.T. 141= 2 Pat. L.R. Civ. 257=5 Lah. 425=51 I.A. 377= 5 L.R.P.C. 133=6 L.L.J. 551=11 O.L.J. 534= A.I.R. 1924 P.C. 183=47 M.L.J. 64 (P.C.).

———In a deed providing for interest being paid out of usufructuarily mortgaged property interest cannot be deemed to be charged on the property. (*Dawson Miller, C.J., and Kulwant Sahay, J.*) KISHUN PRASAD SHAHU *v.* HAKIM CHAUDHURY. **74 I.C. 973= A.I.R. 1924 Pat. 302.**

———*Rents not in lieu of interest—Separate provision therefor—Interest is not a charge on the properties.*

In a mortgage with possession there was a separate provision fixing the rate of interest and the method by which it was to be recovered, namely, that the rents and profits were to be set off, as far as available, towards the payment of interest. The contingency of an excess of rents and profits, over interest or *vice versa* was specifically contemplated, and for the case of deficit, where the whole of the interest was not met from rents and profits, it was provided that the mortgagee may recover from the mortgagors month after month. The sum to be repaid prior to redemption and for the purpose of redemption was merely the original principal sum. *Held*, that the document meant that interest was not to be a charge on the mortgaged property but was left to be recovered under the personal covenant of the mortgagors. (*Schwabe, C.J., and Wallace, J.*) BYSANI MADHAVA *v.* KRISHNASAMY CHETTY. **72 I.C. 987= 16 M.L.W. 743=A.I.R. 1923 Mad. 71.**

—Interest—Compound interest.

In the case of a mortgage, interest at 9 per cent. compound interest is excessive and would not, in any event be enforced by Court. (*Piggott and Walsh, JJ.*) GOVIND DAS *v.* RAM CHARAN LONIA. **68 I.C. 307= A.I.R. 1923 All. 235.**

—Interest—Construction.

———*Interest clause ambiguous—Benefit to mortgagor.*

Where the words used in a mortgage-deed are capable of two different interpretations in regard to the rate of interest the mortgagee is entitled to a decree with interest at the lesser rate, if it is uncertain which of the two rates is allowed by the document. (*Macnair, A.J.C. and Staples, A.J.C.*) BHASKAR RAO *v.* BALKUND. **A.I.R. 1929 Nag. 162.**

MORTGAGE—Interest—Nature of.

———*Construction of—Deed stating that mortgagee was entitled to possession of the property in lieu of the principal in case of default and that during possession he should not claim interest—Mortgagee was held not entitled to interest on the sum accrued as interest on original principal up to date of his taking possession for default.*

Where it was stipulated that if the interest be not paid on due date it would be added to the principal and that interest would run on the total amount of principal and interest; where mortgagee had the option to take possession of the mortgaged property in lieu of the principal amount for a period of 12 years from the date of entering into possession in default of mortgagor fulfilling certain conditions and where it was provided that during the period of possession the mortgagee will appropriate in lieu of interest all the produce profits of the mortgaged villages. And where during the period of possession, neither the mortgagee would have any claim to interest nor the mortgagor to profit; nor would there be any accounting as to shortage or surplusage of profits at the time of redemption:

Held: that the possession to which the mortgagee was entitled was not only in lieu, of the original principal, but of the whole amount due at the time, so that the mortgagee had no right to further interest on the sum which had accrued by way of interest on the principal till date of possession. (*Dalal, J.C. and Neave, A.J.C.*) (RAJA SETH) SWAMI DAYAL *v.* MUHAMMAD SHER KHAN. **83 I.C. 829= 11 O.L.J 148 =A.I.R. 1925 Oudh 39.**

———A usufructuary mortgage provided that after the expiry of thirty years at the time of redemption, interest shall be paid along with the principal at the rate of 1 per cent. per mensem.'

Held, that interest was to begin from the expiry of mortgage period. (*Mr. Ameer Ali.*) RAJA SIR MOHEMMAD ALI MOHAMMAD KHAN BAHADUR *v.* QUZI RAMZAN ALI. **58 I.C. 891=69 I.C. 65= 23 O.C. 150=24 C.W.N. 977=14 M.L.W. 710= 7 O.L.J. 350=A.I.R. 1921 P.C. 100 (P.C.).**

—Interest—Damdupat.

In a mortgage suit where interest is calculated at the contractual rate up to the date of the *dies datus*, the decree is subject to the rule of *damdupat* up to that date. (*Mitra, A.J.C.*) NARAYAN *v.* WAMAN. **59 I.C. 121=A.I.R. 1921 Nag. 133.**

—Interest—Legality of.

Condition in a mortgage-deed for the payment of compound interest on failure of payment of interest at the end of each year is not unlawful and unenforceable. (*Zafar Ali and Jailal, JJ.*) MT. JASWANT KUR *v.* GAJAN SINGH. **112 I.C. 602= A.I.R. 1928 Lah. 601.**

——Interest—Nature of.

———*Loan on a mortgage payable by yearly instalment with interest—Defaulted instalment to bear compound interest at higher rate—On default of three instalments whole sum to become exigible—Default made—Interest on the exigible sum is simple and not compound.*

Courts do not lean to compound interest nor award it in the absence of stipulation: 28 Bom. 371, Rel. on.

Where a loan was taken on a mortgage on condition that it should be repaid by annual instalments along with the interest, that if there was a default in the payment of any instalment that instalment was to bear compound interest at a higher rate, and that in default of three instalments the whole sum was to become exigible.

Held: that there was no express stipulation to pay

MORTGAGE—Interest—Nature of.

interest after the whole sum became exigible. The condition that defaulted instalments should carry enhanced compound interest was a condition by way of penalty and provided only for the period during which instalments were in arrears but the whole sum was not exigible.

As in the bond there was no express stipulation for compound interest, the stipulation compound being by way of penalty coming into force as soon as there was default, it cannot be a provision for compound interest and only simple interest could therefore be awarded: 28 Bom. 371, Foll. *(Macnair, A. J. C.)* ASARAM *v.* DNANOBA. **105 I.C. 158 = 23 N.L.R. 168 = A.I.R. 1928 Nag. 67.**

——*Deed providing for compound interest on default of any instalment on demand—No demand made till all instalments becoming due—Compound interest is not payable.*

A mortgage-deed, under which amount was payable by instalments provided "Should in any instalment as aforesaid there be default in paying either the principal sum or the interest, we shall, whenever you may require, for the principal sums as may be due till then, irrespective of the subsequent instalments, pay compound interest accruing thereon at 1¼ per cent, a month at 12 months' rest, from the date of default." The last instalment was payable in May 1921. Certain instalments were paid and endorsements made on the document. On the 19th June 1918, a sum of money was paid as compound interest, but the compound interest paid was with monthly rests at 14 annas per cent, and not as stipulated in the document. Then nothing was paid, and, on the 21st November 1921, the mortgagee sent a notice demanding payment, but by the time the notice was sent, all the instalments had become due.

Held: that there was no question of exercising any option.

As the notice was not sent after the instalments had become due, the mortgagee was entitled to simple interest at 14 annas per cent. and not enhanced interest or compound interest: (1918) M. W. N. 586, Foll.

The fact that the mortgagee got compound interest in a manner not provided for by the terms of the document would not show that there was any promise to pay compound interest for future default at the same rate. *(Kumaraswami Sastri and Curgenven, JJ.)* M. S. VENKATACHALAM *v.* DORAISWAMI. **102 I.C. 141 = A.I.R. 1927 Mad. 1158.**

——*Compound interest—No presumption exists in its favour, in absence of specific stipulation.*

The mere fact that the mortgage is for a period of four years, and according to the deed interest was calculated every two years does not give rise to a presumption that compound interest is to be charged after every two years, when there is no specific stipulation to that effect, *(Zafar Ali, J.)* BAWA PARBADH SINGH *v.* BABU BODH RAJ. **92 I.C. 195 = 7 L.L.J. 414 = 26 P.L.R. 682 = A.I.R. 1925 Lah. 603.**

——Where at the end of one year from the date of the mortgage document, if there was a default of payment of both principal and interest, the mortgagee was entitled to compensation and where the Lower Courts allowed interest at an enhanced rate on the principal only.

Held: this was sufficient compensation for default in respect of both the principal and the interest. *(Ramesam, J.)* RATNAM PILLAI *v.* KAMALAMBAL AMMAL. **86 I.C. 793 = 21 M.L.W. 252 = A.I.R. 1925 Mad. 778 = 48 M.L.J. 213.**

MORTGAGE—Interest—Payment of.

——*Practice—Pleadings—Mortgage Suit—Plea of no legal necessity, by mortgagor if covers rate of interest also.*

Where the defendants, mortgagors, in their written statement, alleged. "The bond sued upon is entirely illegal and without passing of consideration and is without legal necessity.

Held a plea, even in such general terms, opens the defence that there was no necessity to borrow at the high rate of interest and, that the onus of showing existence of its necessity lies on the lender. Evidence on the lender's part that the money, could not, in the circumstances, have been raised at less interest would suffice to shift the onus so that, if the defendant led no evidence to controvert that statement, the lender would prevail. But when there is no evidence and where the interest charged is far in excess of commercial rates, then undoubtedly the lender has not discharged his task. Evidence simply that on one other occasion, the mortgagor had borrowed at high interest is not in any way conclusive as of what he might have done on the occasion in question. 41 A. 571 P.C.; A. I. R. 1923 P.C. 37, Foll. *(Lord Dunedin.)* RADHA KISHUN *v.* JAG SAHU, **80 I.C. 791 = 5 P.L.T. 434 = 51 I.A. 278 = 26 Bom. L.R. 732 = 20 M.L.W. 285 = 2 Pat, L.R.. 255 = 35 M.L.T. 177 = 4 Pat. 19 = 22 A.L.J. 957 = 29 C.W.N. 293 = 11 O.L.J. 652 = 5 L.R.P.C. 129 = A.I.R. 1924 P.C. 184 = 47 M.L.J. 329 (P.C.).**

—Interest—Payment of.

——*Interest payable annually—Period seven years—No clause about interest after period—Interest payable.*

The mortgage deed provided that interest would be paid every year during the fixed period of seven years and in case of default the mortgagee would enter into possession, and that there would be redemption after the period of seven years. There was no express covenant in the document which specifically stated that interest would be recoverable even after the period of seven years had expired. On the other hand, there was no clear recital which would show that no interest after that period would be due.

Held: that in the absence of any express recital to the contrary it must be presumed from the terms of the document that subsequent interest was contemplated and that the mortgagors were liable for the same: 19 All. 39 (P.C.) and A.I.R. 1923 All. 7, Rel. on. *(Sulaiman and Kendall, JJ.)* HARI RAM *v.* GOKUL PRASAD. **A.I.R. 1930 All. 624.**

——Plaintiff mortgaged his property for a period of six years to the defendant and agreed to pay interest every month consenting to pay it even for the intercalary months, according to the vernacular calendar. Subsequently he executed a rent note agreeing to pay rent at the rate of the interest every month for 72 months. On redemption plaintiff's agent paid interest for 74 months including the two intercalary months.

Held: that the rent note did not supersede the mortgage and the mortgagor was bound to pay interest even for the two intercalary months.

Held further: that as the payment was voluntary, it could not be recovered by the plaintiff. *(Kemp, Ag. C. J., and Murphy, J.)* MANILAL LALLUBHAI *v.* CHANDULAL TRIBHOVANDAS. **A.I.R. 1930 Bom. 430.**

——*T. P. Act, S. 65.*

Where from the language of mortgage deed it is quite clear that interest shall not be payable to the mortgagee after a certain date the mortgagee is not entitled to interest after the date. *(Ashworth and*

MORTGAGE—Interest—Payment of.

Raza, JJ.) GOURISHANKAR *v.* BHAIRON PERSHAD.

92 I.C. 17=13 O.L.J. 289=A.I.R. 1926 Oudh 207.

———*Usufructuary mortgage—Clause for recovery of money in case possession not given—Right to interest.*

Where there was no express provision in an usufructuary mortgage deed for the payment of interest, but there was a clause that should the mortgagor fail to compensate from his other properties for the loss of possession suffered by the mortgagee, the latter would be entitled to whole mortgage money with costs and damages.

Held: that the mortgagor was entitled to interest for the part of the debt proportionate to the portion of the property of which possession was not given to him: 9 O. C. 144, Dist. (*Neave, A. J. C.*) BASAWAN *v.* NATHA. **82 I. C. 747=11 O. L. J. 452=A. I. R. 1925 Oudh 30.**

———Where a mortgagee failed to keep regular account of the income of the mortgaged property according to the agreement in the mortgage-deed; *Held* The interest on the mortgage money and the income of the garden should balance each other. 95 P. L. R. 1908, followed. (*Shadi Lal, C. J. and Harrison, J.*) SHAMBHU NATH *v.* NIHAL CHAND.

A. I. R. 1922 Lah. 213.

—Interest—Post diem.

———*Mortgagor making default—Interest should be allowed till debt is recovered.*

In the absence of anything to the contrary in the terms of a mortgage deed, it cannot be presumed that the parties intended that the debt advanced by the mortgagee should cease to carry interest after a default was made by the mortgagor in discharging the mortgage-debt, the ordinary presumption is that a creditor who has advanced a debt on interest, intends that debt to carry interest till the same is paid off: 35 All. 534, not Foll.; A.I.R. 1923 All. 7 Foll. (*Iqbal Ahmad, J.*) HANUMAN RAI *v.* DIPAN RAI.

100 I. C. 5=A. I. R. 1927 All. 793.

———*Mortgage by conditional sale—Post diem interest when allowed.*

Where the mortgage deed is silent as to the payment of post diem interest and there is no express provision that post diem interest is not to be paid, the presumption is that interest was intended to run so long as the principal money was not paid off: 19 All. 39: 20 All. 171; 1 O. L. J. 50; and 7 O. L. J. 348. Rel. on. (*Raza, J.*) AMAR SINGH *v.* BAIJNATH SINGH.

93 I. C. 958=A. I. R. 1926 Oudh 378.

———There is no fixed construction for contracts to be adopted in all cases where there is a question of post diem interest. The determination of the question 'must depend upon the construction of the terms of the document as a whole. The strictest construction of the word is in accordance with the usual intention of the parties to similar deeds: 19 All. 39; 35 All. 534, Foll. (*Wazir Hasan, A. J. C.*) SANT BAKHSH *v.* DILDAR HUSAIN. **76 I. C. 1053=A. I. R. 1925 Oudh 47.**

———Where no express provision for *post diem* interest was made in a mortgage deed which, however, taken as a whole, provided that interest was to run without any limitation as to the period of its currency, *post diem* interest ought not to be refused. (*Rupchand Bilaram, A. J. C.*) TULSIDAR KESHOWDAS *v.* HASHI. **78 I. C. 868=19 S. L. R. 237=A. I. R. 1925 Sind 164.**

———*English mortgage—Mortgagee is entitled to* post diem *interest after the due date but not compound interest—Mortgagee with power of sale can claim* post diem *interest.*

MORTGAGE—Interest—Post diem.

The mortgagee of an English mortgage is entitled to *post-diem* interest up till the date of redemption at the same rate as that provided for in the document for the period fixed for payment unless the terms of the document show that the parties intended that no interest should be paid subsequent to the date when the mortgage-money falls due. (Case-law reviewed). The mortgagee is however not entitled to compound interest. A power of sale to the mortgagee on failure of the mortgagors to pay the amount with interest on the due date does not impliedly destroy right to subsequent interest. (*Kumaraswamy, Sastry., J.*) CAHMBELL *v.* AUDIKESAVALU NAIDU. **82 I.C. 393=20 M.L.W. 153=A.I.R. 1924 Mad. 736.**

———Where the mortgage money was payable after two years and the contract rate was 22½ per cent per annum with yearly rests but there was no stipulation for interest after two years. *Held*: that after that period contract rate should not be allowed especially when the security was amply sufficient. When the contract rate is so onerous, the deed should be read as far as possible in favour of the mortgagor. (*Dalal A.J. C.*) HUSSAIN KHAN *v.* GANESH PRASAD. **77 I.C. 383=10 O.L.J. 390=A.I.R. 1924 Oudh. 118.**

———*Mortgagee is entitled to, till payment.*

A mortgagee is entitled to *post diem* damages at the rate of interest stipulated in the instrument of mortgage and for the whole period during which the principal sum has remained unpaid. 3 Lah. 200, Foll. Interest on the cost of repairs should not be given. 57 P.R. 1888, Dist. (*Campbell, J.*) RAMJI LAL *v.* SHIBBA. **75 I.C. 667=A.I.R. 1923 Lah. 309.**

———Where *ante diem* interest is not charged on the mortgaged property, *post diem* interest by way of damages cannot be charged on the property. (*Scott-Smith and Brasher, JJ.*) TULSI RAM *v.* KANSHI RAM. **70 I.C. 986=A.I.R. 1923 Lah. 254.**

———Post diem *interest not provided in document—Subsequent interest by way of damages can be given.*

A property was mortgaged for Rs. 1,800 and was to be redeemed in 6 years. Out of the consideration Rs. 1,000 was to bear interest Rs. 250. Income from property was to be appropriated for interest on the remaining 800 Rupees. Plaintiff who purchased ½ of the equity of redemption sued for redemption.

Held: interest should be allowed on Rs. 333-5-4 *i.e.*, 1/3 of Rs. 1,000 on which interest was to be charged according to the original contract of six years at the contract rate and as to *post diem* interest 18 p. c. was a reasonable rate up to date of decree. (*Shadi Lal, C.J. and Abdul Quadir, J.*) GHANNU RAM *v.* HATU RAM. **79 I.C. 984=A.I.R. 1923 Lah. 54.**

———*No stipulation as to interest after due date* —Post diem *interest can be claimed as damages for entire period if mortgagee is defendant and for 6 years if he is plaintiff.*

In the absence of any stipulation, express or implied, the mortgagee is not entitled to interest after the due date. But he is entitled to damages to be calculated ordinarily at the covenant rate of interest and for the entire period during which the principal sum has remained unpaid, unless the mortgagee is himself the plaintiff in which case the period is the same as that prescribed by the Statute of Limitation for a suit for the recovery of damages on the footing of the mortgage in his favour.

Per *Rossignol, J.*:—In the case of mortgages comprising a stipulation of conditional sale a covenant to pay *post diem* interest up to date of redemption must be implied, unless there are very strong reasons to the contrary. (*Shadi Lal, C. J., Chevis, Scott-*

MORTGAGE—Interest—Post diem.
Smith, Le Rossignol and Broadway, JJ.) MOTAN MAL *v.* MD. BAKSH. **66 I.C. 771=3 Lah. 200=42 P.L.R. 1922=A.I.R. 1922 Lah. 254 (F.B.).**
———Where it is agreed that a mortgage with possession of a house should be redeemed within four years on payment of the principal sum with interest at 9 per cent, per annum, failing which the mortgage would become a sale, no interest could be allowed after the expiry of that period. 57 P. R. 1914; 94 P. R. 1914, Foll. (*Martineau, J.*) GHATU RAM *v.* RAM MAL. **64 I.C. 230 (Lah).**

—Interest—Recovery of.
The mortgagees are not entitled to any interest on the mortgage money after the mortgaged properties have been sold and the mortgage has come to an end and they cannot be allowed interest on the sale proceeds of the mortgaged properties while they are lying in the Court. (*Heald and Otter, JJ.*) S. A. S. CHETTIAR FIRM *v.* U. MIN DIN. **118 I.C. 416=A.I.R. 1929 Rang. 127.**
———Where the bond stipulates that in lieu of interest the mortgagee is put in possession of the mortgaged property and it is not found that he has been dispossessed, he cannot be entitled to any interest but can recover only the principal. (*Cuming and Page, JJ.*) KRISHNA CHARAN *v.* NITYA SUNDARI. **97 I.C. 412=A.I.R. 1926 Cal. 1239.**

—Interest—Reduction of.
A Court has no power to reduce the contract rate of interest solely on the ground that it is excessive: A.I.R. 1923 Oudh 8, Foll. 1 O.L.J. 263, Dist. (*Raza, J.*) SARDA BUX SINGH *v.* KANDIA BUX. **92 I.C. 665=13 O.L.J. 330.**

—Interest—Set-off.
P mortgaged certain lands to *U*. *P* for satisfaction of *U* let out in thika some of the lands mortgaged to *U's* nominee *M* for payment of interest. From the date of possession *M* was to pay to *U* every six months towards interest year after year until repayment of the entire debt a certain sum. After some years *P* took a sub-lease from the lessee and undertook to pay the interest directly to the mortgagee. When the sub-lease was taken Rs. 2,000 was paid by the mortgagors as peshgi. *U* brought a suit for his mortgage amount.
Held: that *M* was only a figure-head and therefore the peshgi paid must be set off against interest due on the mortgage. (*Ross and Wort, JJ.*) UPENDRA NATH BASU *v.* THAKUR PRASAD SINGH. **113 I.C. 715 (Pat.).**

—Keeping Alive—*See* ALSO T. P. ACT, S. 75 AND 101.
———A mortgagee is entitled to have the properties sold in execution of mortgage decree in his favour subject to his prior usufructuary mortgages. 38 Mad. 927 (F.B.) Foll. (*Sadasiva Aiyar and Spencer, JJ.*) SANYASIAH *v.* M. P. ATCHANNA NAIDU. **70 I.C. 759=15 M.L.W. 289=A.I.R. 1921 Mad. 624=42 M.L.J. 339.**

—Merger.
———*Mortgage suit pending—Plaintiff acquiring property in Court sale in execution of money decree against defendant—Suit must be dismissed.*
Where during the pendency of a mortgage suit the mortgagor's right, title and interest in the suit properties were acquired by the mortgagee by virtue of a sale in execution of a money decree and where the sale was confirmed after the mortgage suit had been decreed *ex parte*.
Held: in appeal that the mortgage suit must be dismissed as the mortgage must be deemed to have been satisfied on the date on which the plaintiff had acquired in the execution sale the mortgagor's interest. (*Venkatasubba Rao and Srinivasa Aiyangar, JJ.*) BALAMANI AMMAL *v.* RAMA AIYAR. **87 I.C. 57=21 M.L.W. 528=1925 M.W.N. 163=A.I.R. 1925 Mad. 786=48 M.L.J. 273.**

—Moveables.
Hypothecation of moveables without possession is legal. (*Mukerji, J.*) JATINDRA CHANDRA CHOWDHURY *v.* THE RANGPUR TOBACCO CO., LTD. **80 I.C. 20=A.I.R. 1924 Cal. 990.**

—Moveables—Mortgage of.
Sale by mortgagor to third party without notice of mortgage—Mortgagee cannot follow the property in the hands of the third person, without notice. (*Maung Kin, J.*) MAUNG SHWE HNYIN *v.* LALA FULCHAND. **74 I.C. 52=1 Bur. L.J. 136=A.I.R. 1923 Rang. 60.**

—Novation.
The prayer of an application in settlement proceeding was that a certain mortgage with its terms stated in it might be recorded in the settlement papers. The application was followed by a compromise between the parties. The profits of the mortgaged property were by amicable settlement fixed at a certain amount and the shares of mortgagor and mortgagee therein were so settled that the mortgagor got a slight advantage over the share to which he had been entitled under the original mortgage. The compromise further stated that the arrangement reached thereby would come into effect from the commencement of a certain year. The compromise was accepted and recorded by the settlement Court and was followed by entries in the Khasra.
Held, that the arrangement amounted to a fresh mortgage. (*Wazir Hasan, A.J.C.*) BALAK DASAUNDHI *v.* DEPUTY COMMISSIONER OF FYZABAD, **84 I.C. 150=12 O.L.J. 60=27 O.C. 357=A.I.R. 1925 Oudh 308.**

—Occupancy holding.
Mortgage of non-transferable tenure is valid as between mortgagor and mortgagee. (*Sen and Niamatullah, JJ.*) GAJI SINGH *v.* MT. NECHABHA. **119 I. C. 514=1929 A. L. J. 309=10 L. R. A. Rev. 138=A.I.R. 1929 All, 223.**

—Penalty.
A mortgagee who in the past has waived his right on the occurrence of a default, is not bound to give notice before enforcing his penalty on a subsequent default that the waiver will not be repeated. (*Le Rossignol and Harrison, JJ.*) PARTAB SINGH *v.* NATHU. **69 I. C. 706=3 Lah. 285=A. I. R. 1922 (Lah.) 416.**

—Personal covenant.
Where a mortgage deed fixed a date for payment and recited that the mortgagor, having paid the money by the date, will take back the land mortgaged
Held: there was a personal covenant to pay. 39 M. 1010, (1918) M.W.N. 672 & 13 L. W. 434, Dist. 17 M. 131 & 27 M. 526 Foll. (*Odgers and Hughes, JJ.*) RANGASWAMI AYYANGAR *v.* VEERARAGHVACHARRY. **76 I. C. 1003=18 M.L. W. 620=33 M. L. T. 73=1923 M. W. N. 789=A. I. R. 1924 Mad. 513=46 M. L. J. 56.**
———*Personal covenant is implied in every mortgage.*
Every mortgage includes a personal covenant to repay the money lent unless it is negatived expressly or by necessary implication by the terms of the bond or the circumstances of the case. Express agreement to repay the debt is not necessary. 12 N.L.R. 19 found over-ruled. 4 Mad. 179 Dist. and A.I.R. 1922 Nag. 119

MORTGAGE—Personal covenant.

Diss. (*Hallifax, A.J.C.*)GOPI KISAN *v.* MT. MANKUAR. **78 I. C. 239=20 N. L. R. 46=A.I.R. 1924 Nag. 97.**

——*General stipulation regarding interest, without limitation as to its currency—Must be treated as applicable to whole period of mortgage.*

Where a deed of mortgage provided that the mortgagor shall pay the principal money secured by the mortgage with stipulated interest within 7 years, and further that the interest due shall be paid half-yearly and that if the interest for any half-year remained unpaid it shall be added to the principal and shall carry compound interest at the stipulated rate, *Held* : a general stipulation in a mortgage deed that the mortgage money shall bear interest at a certain rate without any limitation as to its currency should be treated as applicable to the entire period for which the mortgage money might remain unpaid. (*Kanhaiya Lal, J. C.*) NAJMUNNISA *v.* RAGHUNATH. **67 I. C. 963=25 O. C. 36=A. I. R. 1922 Oudh 122.**

—Personal Liability.

——An alienation by a Hindu father is not void *ab initio*, but is voidable at the instance of his sons or reversioners. Where the mortgage contained an indemnity clause that if any objector or claimant arose, then the mortgagor would be personally liable, as soon as the decree was passed in favour of his sons that the property was not liable under the mortgage, the indemnity clause came into action and the mortgagor became personally liable to recoup the mortgagee and limitation began to run from the date of the decree. (*Dalip Singh, J.*) BIHARILAL *v.* HARISINGH. **106 I. C. 816 (Lah).**

——In India a mortgage carries with it a personal liability. 14 All. 573. Foll. (*Gokul Prasad, J.*) AMAR DEO PANDE *v.* GAYA PANDE. **71 I. C. 393=A. I. R. 1923 All. 408.**

——Lahan Gahan *form of mortgage does not involve personal liability.*

If the mortgage is a mortgage with a condition of "*lahan gahan*," it ordinarily involves no personal liability on the part of the mortgagor for re-payment of the debt, unless it may, by special agreement or local custom, confer on the mortgagee the option of recovering the money from the mortgagor personally. The parties having adopted a form of mortgage which ordinarily is understood to involve no personal liability must be taken not to have contemplated it. (*Kotval, A. J. C.*) KUNDANMAL *v*, WASUDEO. **69 I. C. 615=5 N. L. J. 259=19 N.L.R. 67=A.I.R. 1922 Nag. 119.**

—Personal Remedy.

The question, whether the plaintiff is entitled to a personal decree, for the recovery of the money which has been found advanced, the mortgage-deed having been held invalid, is a question of the Limitation Act, the period of limitation being in such a case six years. (*Mukerjee and Buckland, JJ.*) SRISTIDHAR GHOSE *v.* RAKHYAKALI DASI. **63 I. C. 507=49 Cal. 438=26 C. W. N. 264=A. I. R. 1922 Cal. 168.**

—Prior and subsequent.

——*Suits by prior and puisne mortgagees without either impleading the other—Decree in favour of both mortgagees—Puisne mortgagee bringing suit for possession held entitled to possession on payment of mortgage money to prior mortgagee.*

A prior mortgagee brought a suit in 1919 on his mortgage and obtained a decree for sale without impleading the puisne mortgage who was in actual possession of the mortgage premises as usufructuary mortgagee. The puisne mortgagee, in 1921, instituted a suit for sale on his mortgage without impleading the prior mortgagee and got a decree. But on failure to get an order of mutation in revenue Court, the puisne mortgagee brought the present suit against the prior mortgagee for possession.

MORTGAGE—Prior and subsequent.

Held : that the puisne mortgagee was entitled to possession upon payment of the amount which was decreed as due to prior mortgagee in his suit of 1919.

Held also : that as the puisne mortgagee was in possession as usufructuary mortgagee, the prior mortgagee was entitled to interest at the rate decreed in suit of 1919 up to a date fixed by the High Court : A.I.R. 1922 P.C. 11, Rel. on. (*Banerji and King, JJ.*) MAKHAN LAL *v.* SOHAN LAL. **A.I.R. 1930 All. 355.**

——Suit by prior mortgagee against mortgagor and subsequent mortgagee—Personal decree cannot be passed against subsequent mortgagee.(*Shadi Lal, C.J. and Abdul Qadir, J.*) KHAZANCHI SHAH *v.* NIZAM DIN. **31 P.L.R. 506=A.I.R. 1930 Lah. 791.**

——Rights of prior mortgagee can be enforced against subsequent mortgagee with full notice of prior mortgagee. (*Jailal, J.*) NAND LAL *v.* NARAIN SINGH. **117 I.C. 666=A.I.R. 1929 Lah. 207.**

——The usufructuary mortgagee is entitled to prevent an encroachment or trespass upon the property mortgaged while a simple mortgagee is not so entitled. But such rights relate to acts of third persons and not as between a prior and a subsequent mortgagee. (*Jailal, J.*) NAND LAL *v.* NARAIN SINGH. **117 I.C. 666=A.I.R. 1929 Lah. 207.**

——Where the subsequent mortgagee is impleaded in the suit of the intermediate mortgagee and is given an opportunity to redeem the latter but he refrains from doing so, he cannot subsequently obtain a decree on his subsequent mortgage for sale subject to the intermediate mortgage. (*Dalal and Pullan, JJ.*) MT. ANPURNA KUNWAR *v.* RAM PADARATH. **100 I.C. 670=49 All. 430=25 A.L.J. 353=A.I.R. 1927 All. 417.**

——A hypothecated eight villages to B in 1898. Subsequently in the same year the same villages were mortgaged to C. Again in 1900, two of the villages were usufructuarily mortgaged to B for a certain amount including the amount due under the first mortgage. Under the usufructuary mortgage B was entitled on dispossession to sue for the amount due to him and to recover the same from the villages comprised in the first mortgage. B was dispossessed in 1911. He sued in 1922 to enforce his first mortgage. C had in 1909 sued on his mortgage, impleading B as a party and purchased two of the villages under his decree and he contested B's right to enforce his charge against the items purchased by him on the ground of limitation.

Held : that C was not bound by the provision in the usufructuary mortgage giving B a fresh right to sue on the simple mortgage from the date of dispossession.

If B retained a right to sue on the simple mortgage, he did so only in accordance with the rule of limitation applicable to that bond and that the suit was, therefore, barred by limitation. (*Dalal and Pullan, JJ.*) MT. ANPURNA KUNWAR *v.* RAM PADARATH. **100 I.C. 670=49 All. 430=25 A.L.J. 353=A.I.R. 1927 All. 417.**

——A mortgagor effected a mortgage and died. His major son, acting for himself and his minor sons, effected a second mortgage and then a third mortgage was effected by the widow of the mortgagor acting for the minor sons ; second mortgagee brought a suit for redemption of the first mortgage, in which objection was taken by the first mortgagee that the second mortgage was invalid on the ground that the major son could not validly effect a mortgage for the minors ;

MORTGAGE—Prior and subsequent.

the sons supported the plaintiff's claim.

Held : that the first mortgagee cannot question the validity of the second mortgage in face of the sons' acceptance of the second mortgage in pleadings. (*Jai Lal, J.*) MAULA BAKHSH *v.* IMAM DIN.

101 I.C. 324=28 P.L.R. 6=A.I.R. 1927 Lah. 81.

———*Suit by subsequent mortgagee without impleading prior mortgagee—No relief in respect of prior mortgage sought—Court should not go into the validity or existence of prior mortgage—Any decision given is not binding,*

It is open to a second mortgagee to sue for and obtain a decree for sale of the property covered by his own mortgage without impleading the prior mortgagee of the same property; the effect of a decree based on a second mortgage is only to direct sale of such rights of the mortgagor as existed at the date of that mortgage,the rights of the prior mortgagee being in no way affected by it. The property is necessarily sold subject to the pre-existing rights under the prior mortgage. If the second mortgagee wants the mortgaged property to be sold free of the prior encumbrance and if he had reason to think that the prior mortgage was either non-existent or fictitious or invalid for any reason, it is open to him to challenge it and he might frame his suit differently and ask that a decree directing sale of the property free of the so-called prior encumbrance be passed in the suit, and in that case, if the person who relies upon the prior mortgage fails to prove it, the second mortgagee would be entitled to a decree directing the sale of the property free of the prior encumbrance. But where he does not seek that relief, it is wholly unnecessary to go into the question of the existence or validity of the prior mortgage and if the Court has through inadvertence decided it, the decision is not binding on the defendant : 26 Mad. 760 ; 2 N.L.R. 94 and A. I. R. 1924 Nag. 429, Ref. (*Kinkhede, A. J. C.*) BALWANT *v.* MANOHARDAS RANGILDAS. **97 I.C. 977= A.I.R. 1927 Nag. 38.**

———*Prior mortgagee impleaded as holding next subsequent mortgage—His priority is not lost.*

The prior mortgagee is not barred from putting forward his claim, when the prior mortgage is not impugned in the suit by subsequent mortgagee and the subsequent mortgagee has not sought to displace the prior title of the prior mortgagee and postpone it to his own. The same principle applies if the prior mortgagee happens to have a third mortgage on the same property and is impleaded in the suit as such : 47 Cal. 662 (P.C.), Ref. (*Walsh and Dalal, JJ.*) COLLECTOR OF MORADABAD *v.* MD. HIDAYAT ALI.

94 I.C. 505=48 All. 554=A.I.R. 1926 All. 449.

———*First mortgagee's suit impleading second mortgagee—Second mortgagee not redeeming—Property sold to first mortgagee—Full value realised and credited to first mortgage—Second mortgagee has no right against property.*

Where three properties were once mortgaged to one and then again to another and the second mortgagee was a party to the first suit by the first mortgagee and failed to exercise his right of redemption, he can have no rights against such properties which pass away to the purchaser in execution of the first decree, free of both the mortgages. Where, therefore, instead of an actual Court sale the property is sold to the first mortgagee himself and full credit is given by him for the value towards the first mortgagee the same result is attained as if they are sold. The effect of the first suit is not that a suit by the second mortgagee against the mortgagor is not maintainable at all but that he has no rights to pursue against the common mortgaged items. 24 A. 429 P.C. Appl. (*Ramesam and Jackson, JJ.*) RAMASAMI PILLAI *v.* NARAYANASAMI PILLAI.

86 I.C. 548=21 M.L.W. 318=1925 M.W.N. 82= A.I.R. 1925 Mad. 483=48 M.L.J. 100.

———When two mortgagees bring suits each suing without making the other mortgagee a party, the rights of either mortgagee are not affected by the suit brought without making him a party. The result is the puisne mortgagee, would be entitled to redeem the prior mortgagee unless some difficulty of limitation arose. (*Krishnan, J.*) R. APPAYYA *v.* A. VENKATARAMAYYA. **82 I.C. 864= 20 M.L.W. 620=A.I.R. 1925 Mad. 150.**

———Where the subsequent mortgage takes the mortgage fully knowing the liabilities created under the first mortgage and undertaking to clear the prior mortgage, even where in a sale by the prior mortgagee the interest has been bought by mortgagor himself, the subsequent mortgagee takes subject to the mortgagor's rights.

A subsequent mortgagee redeeming prior mortgage stands in the shoes of the prior mortgagee and is bound by a grant or disposition made by the latter and is also bound by the covenants and equities binding on him and operating in the mortgagor's favour. (*Kinkhede, A. J. C.*) AMARCHAND *v.* SARDAR SINGH. **82 I.C. 190=A.I.R. 1925 Nag. 90.**

V, a co-partner mortgaged his property to O partly in satisfaction of a debt due by V and A, joint partners, to O. The cash consideration was not advanced by O to V and in fact this mortgage was neither novation nor extinction of the debt due to O. In pursuance of a later arrangement V was entitled to an indemnity from A against all liability as a partner in respect of the debt, and A executed a mortgage of his property in favour of V in pursuance of the arrangement. Neither V nor A received any moneys under their respective mortgages from O and V respectively. In a suit by V to enforce the mortgage against A,

Held : that though V was entitled to have that right of indemnity declared and enforced by an order on A to pay off the debt if the right were disputed or the obligation neglected, still the mortgage could not be enforced unless and until it was proved that V made payment of the money under his mortgage to O but not on the ground that there was no consideration. (*Lord Blanesburgh.*) VEERAPPA CHETTY *v.* ARUNACHALAM CHETTY. **86 I.C. 259= 26 Bom. L.R. 661=20 M.L.W. 368= 1924 M.W.N. 559=35 M.L.T. 161= 29 C.W.N. 438=4 Rang. 48= A.I.R. 1924 P.C. 192=47 M.L.J. 168 (P.C.).**

———*Suit by prior mortgagee after puisne mortgagee's suit for foreclosure was decreed—Prior mortgagee's decree is futile.*

A puisne mortgagee obtained a decree for foreclosure without making a prior mortgagee a party and thus became the owner of the equity of redemption. The prior mortgagee subsequently got a decree against the representative of original mortgagor.

Held, that the prior mortgagee having got a decree against the person, who was not legally entitled to possession at the date of the suit, had no right under his decree against the puisne mortgagee and that an auction purchaser under his decree got nothing by the purchase. (13 N.L.R. 69, Foll ; A.I.R. 1922 Nag. 89, F. B. Dist.) (*Baker, O. J. C.*) MULCHAND *v.* BABULAL. **76 I.C. 164=A.I.R. 1924 Nag. 210.**

———*Prior mortgagee getting decree on his mortgage without impleading puisne mortgagee, cannot redeem puisne mortgagee.*

MORTGAGE—Prior and subsequent.

After a mortgage of 1898, the mortgagor again mortgaged the property in 1904. The puisne mortgagee defendant brought his mortgage suit in 1906, and it was compromised in 1907. The mortgagor failed to pay the instalments and the property as provided by the decree passed in execution to the puisne mortgagee defendant in 1911, his foreclosure suit having been dismissed. In 1909 the prior mortgagee brought a suit on his mortgage, obtained a decree for sale in 1910 and assigned it in 1915 to plaintiff who in 1918 purchased the property. Plaintiff then sued defendant claiming to redeem him and contended that there never was passed a final decree in defendant's suit.

Held: Assuming that a prior mortgagee is a person who has a right to redeem under section 91 (*a*) of the T. P. Act, his rights as a mortgagee having become merged in his decree he cannot any longer claim to redeem the mortgage in that capacity. So long as the defendants' right to redeem the plaintiff as prior mortgagee subsists, the plaintiff cannot exercise his right, if any, to redeem the defendants' mortgage, for the result of allowing him to do so would be to compel the defendants to redeem the plaintiff at a time chosen by the plaintiff or to be redeemed themselves. As an auction-purchaser the plaintiffs' rights came into existence after the defendants had got their decree and possession thereunder and he cannot claim to be in any better position than the mortgagor whose interests he claims to represent. (*Kotwal, A. J. C.*) LAXMI NARAYAN *v.* RADHAKISHAN. **A.I.R. 1923 Nag. 24.**

——Purchaser from mortgagor paying off prior mortgage and getting into possession can, in suit by puisne mortgagee claim amount paid to prior mortgagee but not interest thereon. (*Tudball and Sulaiman, JJ.*) ANANDI PRASAD *v.* KRISHNA CHANDRA. **63 I.C. 738=44 All. 9=19 A.L.J. 792= A.I.R. 1922 All. 185.**

——Puisne mortgagee allowing foreclosure of prior mortgage without redeeming does not lose right to sue mortgagor on personal covenant. (*Adami and Bucknill, JJ.*) RAMJANAM SINGH *v.* KUNJ BEHARI SINGH. **63 I.C. 252=1922 P.H.C.C. 106= 6 P.L.J. 670=A.I.R. 1922 Pat. 154.**

—Priority.

A mortgage created by deposit of title deeds stands in the Province of the Punjab on the same footing as any other mortgage permitted by law. The question of priority between such mortgages should therefore be treated as between two valid mortgages and no question of preference between a "legal" and an "equitable" mortgage arises. The transaction prior in time must take precedence over subsequent transaction. (*Addison and Bhide, JJ.*) RALLI BROTHERS OF KARACHI *v.* PUNJAB NATIONAL BANK, LTD. **A.I.R. 1930 Lah. 920.**

——*Suit on prior mortgage impleading second mortgagee—Decree for sale—Mortgagor selling mortgaged properties and satisfying prior mortgage——Vendee is entitled to claim priority over the second mortgage at the second mortgagee's suit.*

A executed two mortgages, one in favour of B and the other in favour of C. After the execution of the second mortgage, B brought a suit on his mortgage impleading C as party and got a decree. The properties were put to sale. A sold some of the properties privately and paid off B before the sale was confirmed. The sale to D purported to convey the properties free from all encumbrances. Then C sued on his mortgage impleading D as a party.

Held: that D was entitled to claim priority over the mortgage of C, as intention to keep the first mortgage alive for benefit of D must be presumed.

MORTGAGE—Redemption—Admission.

(*Mukerji and King, JJ.*) MADHO SINGH *v.* PANCHAM SINGH. **101 I.C. 409=25 A.L.J. 45=49 All. 233= A.I.R. 1927 All. 211.**

——*Security is extinguished after decree absolute for sale is passed—But priority is not extinguished and it becomes a priority of the decree-holder.*

A subsequent transferee who pays off the prior mortgagees, who have obtained decrees for sale on their mortgages, is entitled to priority to the extent of the amounts paid as against any intermediate mortgagees.

Per *Mukerji, J.*—The decision of their Lordships in A.I.R. 1922 P.C. 11 should be read as by a clear implication overruling 40 All. 407 (P.C.) on the interpretation of words which nobody understood as making a sense.

Per *Sulaiman, J.*—The decision in A. I. R. 1922 P.C. 11 cannot be held to overrule the previous pronouncement in 40 All. 407 (P.C.). Therefore it must be taken that the effect of the provisions of the old S. 89 was to extinguish the security as soon as the order absolute was passed. It does not, however, follow from this that the priority also was necessarily extinguished. The passing of the order absolute put an end to the mortgage security, but that security was incorporated into and merged in the decree. The priority of the mortgagee became the priority of a decree-holder. (*Sulaiman and Mukerji, JJ.*) MOHAMMAD ABBAS ALI KHAN *v.* CHOTEY LAL. **97 I.C. 594=24 A.L.J. 1025=49 All. 162= A.I.R. 1927 All. 28.**

——Where it is impossible to decide which of the two mortgages was executed first, it is not open to either of the mortgagees to claim priority over the other and they must rank *pari passu* as if both mortgages had been executed at the same time. 6 C.L.J. 74 Foll. (*Watts, C. J. and Oldfield, J.*) KUTTI THEVAN *v.* RAYAPPA GOUNDAN. **14 M. L. W. 422= 1921 M.W.N. 703=A. I. R. 1921 Mad. 693.**

—Receiver.

——*Simple mortgage—Default in interest—Mortgaged property falling in value—Receiver should be appointed, although ordinarily Courts would not deprive a simple mortgagor of possession.*

While Courts would not ordinarily deprive the mortgagor of his possession in cases where the mortgage is a simple one, there may be circumstances created either by the conduct of the mortgagor or connected with the state of the property which may render it necessary in the interests of justice and for the protection of the mortgagee that a receiver should be appointed. It is impossible to lay down a hard and fast rule laying down under which circumstances the Court will appoint a receiver. But ordinarily there should be some loss or detriment not foreseen by the mortgagee at the time when he chose to take a simple mortgage and allow possession to remain with the mortgagor, which loss could not be compensated except by the appointment of a receiver.

Where a simple mortgagor makes default in paying the interest and the mortgaged property falls in value, the case is fit for the appointment of a receiver: A.I.R. 1926 Mad. 155 and 43 I.C. 533, not Foll. (Case-law discussed.) (*Kumaraswami Sastri, J.*) K. S. ETHIRAJALU CHETTY *v.* A. P. RAJAGOPALACHARI. **115 I. C. 244=29 M.L.W. 553= 52 Mad. 979=A.I. R. 1929 Mad. 138=56 M.L.J. 115.**

—Redemption—Admission.

——*Admission by defendant that he is mortgagee in possession is acknowledgment that he is liable to be redeemed.*

MORTGAGE—Redemption—Admission.

An admission by a mortgagee in his written statement that he is a mortgagee in possession of the land in dispute is a sufficient acknowledgment that the maker of the statement thinks and believes that he is liable to be redeemed at the date of the making of the statement : A.I.R. 1925 All. 353. Appr. (*Mukerji, J.*) CHHEDA LAL *v.* GHULAM ABBAS.

115 I. C. 627=A.I.R. 1929 All. 242.

——Failure to prove the mortgage alleged by the mortgagor disentitles the plaintiff mortgagor to redemption notwithstanding that the defendant admits that he is the mortgagee of the land, unless he also admits the particular mortgage alleged by the plaintiff. 20 O.C. 336 and 27 Bom. 271, Diss. (*Neave, A.J.C.*) JAGJIWAN SINGH *v.* GAJRAJ SINGH.

80 I.C. 543=A.I.R. 1925 Oudh 250.

—Redemption—Clog.

——*Equity of redemption and clog on redemption explained.*

Redemption is of the very nature and essence of a mortgage as mortgages are regarded in equity. Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of which must be as free and unfettered to all intents and purposes as if the land never had been made the subject of the security. The provisions of the mortgage deed conferring on the mortgagee on redemption an interest in the property constitute a clog or fetter upon the equity of redemption. *Noakes & Co. Ltd*, v. *Rice*, (1902) A,C. 24, Foll.; *Santley v. Wilde*, (1899) 2 Ch. 474, Rel. on. (*Lord Tomlin.*) KHAN BAHADUR MEHRBAN KHAN *v.* MAKHNA.

123 I. C. 554=1930 A.L.J. 544=34 C..W.N. 529=31 M.L.W. 732=51 C.L.J. 427=A.I.R. 1930 P.C. 142=11 L. 251=32 Bom. L. R. 882=57 I.A. 168=58 M.L.J. 714,

——*Mere postponement of redemption for a long term is not clog—True test in such cases.*

The mere inordinate length of time fixed for redemption does not constitute a clog on the equity of redemption. The true test in all cases of such nature is : was the transaction in its essence an advancement of a loan on one side and furnishing a security for the same on the other ? If the answer is in the affirmative postponing the right to redeem to an inordinate length of time may reasonably lead to the inference that the intention was to kill that right and this will not be permitted by law. If, on the other hand, the transaction is in its reality more than or different from a pure transaction of a loan and security the equitable doctrine of relief against a clog on the right to redeem has no application. (A.I.R. 1922 Oudh 221, Foll.) (*Wazir Hasan, A.J.C.*) NARAIN DAS *v.* DEBI DIN SINGH. **90 I.C. 566=A.I.R. 1926 Oudh 38.**

——The law views with jealousy the right of redemption in the mortgagor and repudiates all attempts to do away with that right. Where under a usufructuary mortgage it was stipulated that the mortgagor would lose his right to redeem in default of payment of the mortgage-money on a certain date the stipulation is invalid and inoperative. (*Jwala Prasad, J.*) GULAB CHAND *v.* PANCHAM RAM. **59 I. C. 338. (Pat.)**

—Redemption—Deed of further charge.

——*Payment of charge while redeeming mortgage.*

Where a document operates an additional charge which must be tacked on to the amount due under the first mortgage the mortgagor is bound to pay the charge while redeeming the mortgage. (*Shadi Lal,*

MORTGAGE—Redemption—Mortgagee's liability.

C. J. and Agha Haidar, J.) JIWAN *v.* TAHAL SINGH. **12 Lah. L. J. 144.**

—Redemption—Evidence.

——*Foreclosure proceedings taken previously but no record thereof—Mortgagee entered as full proprietor in revenue records—If plaintiff proves mortgage to be within 60 years presumption of correctness of revenue records would be rebutted.*

The plaintiff sued to redeem a mortgage which was with possession and comprised a stipulation by way of conditional sale. Though there had been previously foreclosure proceedings no record of those proceedings, with the exception of a mere entry in a register that notice was served on the mortgagor, was forthcoming. After foreclosure proceedings, a mutation was written up to convert the mortgagee right into a full proprietary right.

Held : the only *onus* thrown upon the plaintiff was to show that there was a mortgage and that it was granted within sixty years of suit. This would rebut the *prima facie* presumption of correctness of the revenue record entry and the defendants would then be fixed with the liability for showing that the revenue entry was in fact correct and that there was a proper and legal foreclosure. (*Le Rossignol, J.*) RULDU RAM *v.* SURAIN SINGH, **92 I. C. 531=7 L. L. J. 618=26 P. L. R. 754=A. I. R. 1926 Lah. 120.**

—Redemption—Limitation.

——*Mortgage before T.P. Act—Provision for forfeiture on failure to redeem within time is valid—Offer to redeem within time refused by mortgagee—Redemption can be enforced within 3 years of refusal.*

Where a usufructuary mortgage provided that redemption was to be effected within two years and that on the failure to do so, the mortgagee had the right to take the land outright.

Held : that under the law as it existed prior to the general extension of the Transfer of Property Act, 1882 to Burma, a forfeiture clause should be construed strictly according to its tenor and given its effect as a clause effecting its purpose and conferring on the mortgagee the additional rights to the property on expiry of the period if redemption had not been effected (or properly demanded) within the specified period of redemption. 13 M. I. A. 560 (P. C.) and 1 M. 1. (P. C.) and 10 B. L. T. 219 Ref. But if the mortgagors did in fact offer to redeem within the stipulated period and they had the money with them ready to redeem, the failure of the defendants to allow redemption would give the plaintiffs a cause of action. Regarded as a suit for specific performance of the covenant in the mortgage-deed to allow redemption within two years, the period of limitation would be three years from the date on which redemption was refused. (*Lentaigne, J.*) MA HIN THA *v.* MA THET SU. **76 I. C. 624=2 Bur. L. J. 119=A.I.R. 1923 Rang. 232.**

—Redemption—Mortgagee's Liability.

Where the terms of the usufructuary mortgage were that the mortgagees were to pay to the mortgagors nothing but Malikana and that they were not accountable to the mortgagors otherwise,

Held : in a suit for redemption that the mortgagors were entitled to redeem on payment of the principal amount of the mortgage after deducting the malikana for the years for which it was not paid by the mortgagees to the mortgagor. (*Daniels and Neave, JJ.*) BEHARI LAL *v.* SHIB LAL. **82 I.C. 25=46 All. 633=22 A.L.J. 579=5 L.R.A. Civ. 414=A.I.R. 1924 All. 591.**

MORTGAGE—Redemptiom—Mortgagee's liability.

———*Property lost through negligence of mortgagee—Liability to account for, must be decided in the redemption suit itself.*

The mortgagee is liable for the restoration of such property as he has through negligence allowed to pass into the hands of third persons and the question as to what the liability of the mortgagee is to account for the properties of which he was given possession should be determined in the suit for redemption itself and not be left to be decided in a separate suit. (*Macleod, C. J. and Shah, J.*) ANANDRAO PURSHOTTAM HATKAR *v.* BHIKAJI SADASHIV VAISHEMPAYAN.

64 I.C. 485=46 Bom. 218=23 Bom. L.R. 979= A.I.R. 1922 Bom. 156.

———On redemption taking place, the mortgagee, who took possession under the mortgage, must return the land to the mortgagor or his assignees. (*Tudball and Rafique, JJ.*) TAMESHWAR *v.* MAHARAJ SINGH.

63 I.C. 114 (All.)

—Redemption—Proof.

Where in a redemption suit the mortgage set up by the plaintiff has been definitely found not to have been proved, the suit must fail: 20 I.C. 29 and 27 Bom. 271, Dist. (*Iqbal Ahmad, J.*) DWARIKA TEWARI *v.* MATA BADAL MALI. **106 I.C. 633= A.I.R. 1927 All. 781.**

———*Redemptor must prove mortgage transaction.*

In a suit for redemption the mortgage transaction has got to be proved by the redemptor. It may be that the *onus* of showing the extent of the charge in a particular case may lie on the mortgagee where it is a matter for accounts. But a mortgagor must prove the transaction and the essentials of the transaction are the sum for which the mortgage was made and the terms, if any, as to interest and duration. (*Dalip Singh, J.*) MAHOMED AYUB *v.* MT. FATIMA SULTAN.

99 I.C. 441=8 L.L.J. 548=27 P.L.R. 777= A.I.R. 1927 Lah. 57.

———*In a suit for redemption, plaintiff must prove subsisting mortgage.*

The plaintiff suing to redeem must prove a subsisting mortgage. In a suit for redemption the only evidence of the mortgage was that contained in a certified copy of the original mortgage deed, and an entry in the *Khasra Abadi* that certain A was then in possession as mortgagee.

Held: the evidence was not sufficient, as no connection was established between the original mortgagee and present defendant, (71 P. R. 1900, 9 Bom. 137, Ref.; 39 Mad. 617, P. C. Dist.) (*Campbell, J.*) RALLA RAM *v.* FEROZ DIN. **77 I.C. 903= A.I.R. 1923 Lah. 665.**

———The *Onus* lies on plaintiffs who seek to redeem the mortgage to prove when the mortgage had been effected. 38 P.R. 1893 and 33 P. R. 1894, Foll. (*Broadway, J.*) SRI RAM *v.* MATWALA RAM.

71 I.C. 577=A.I.R. 1923 Lah. 219.

———The person setting up the plea that a mortgage is irredeemable must prove that it is so. (*Krishnan and Ramesam, JJ.*) RYRU NAMBIAR *v.* KAPPALLI KANARA KURUP. **70 I.C.20=1923 M.W.N. 76= 16 M.L.W. 930=A.I.R. 1922 Mad. 185= 42 M.L.J. 350.**

—Redemption—Right of.

———*Simple mortgage—Possession given by way of additional security—Right of redemption is not lost.*

In the case of a simple mortgage in which the mortgagee has the right to bring the property to sale the mortgagor has a right to bring a suit for redemption: the mortgagor does not lose his right of redemption by the fact that the mortgagee was given an additional security for his money by taking possession of the land, if the original relations of a simple mortgagee and a simple mortgagor are still subsisting. (*Batten, J. C.*) PUNA *v.* LAXMAN PRASAD.

65 I.C. 654=A.I.R. 1923 Nag. 161.

—Redemption—Right to.

———Mortgage for a fixed period in consideration of mortgagee paying regularly instalment decree existing against the mortgagor—Mortgagee making default in paying—Mortgagor is entitled to redeem before the expiry of the fixed period.

Held: When the mortgagee failed to perform his part of the contract, it followed that the mortgagor was also entitled to rescind his promise as well and to recover possession of the mortgaged property under the provisions of Ss. 39 and 54, Contract Act, and S. 24 (2) of the Specific Relief Act without waiting for the expiry of 15 years. (*Wazir Hasan and Gokaran Nath Misra, JJ.*) SANWALEY PARSHAD *v.* SHEO SARUP. **98 I.C. 770=2 Luck. 279= 3 O.W.N. 884=A.I.R. 1927 Oudh 12.**

—Redemption—Successive suits.

———*Decree for sale passed in mortgage suit—Effective execution not taken out—Suit for redemption by mortgagor—Maintainability—Successive suits for redemption when maintainable.*

If a mortgagor has once filed a suit for redemption and has obtained a decree for redemption which is final in its nature it would not be competent for him or his successor in interest to bring a second suit for redemption in respect of the same mortgaged property, although the mortgaged property has not been redeemed in accordance with the decree in the first suit. Similarly if in a prior suit by the mortgagee for sale of the property the decree contains a provision for the mortgagor redeeming the property and the decree is in the nature of a final decree it would not be competent to the mortgagor to bring a fresh suit for redemption in respect of the same property when he has not redeemed the property under the decree in the first suit. But in cases where the mortgagee has not effectively brought the mortgaged property to sale under his decree for sale and has not obtained an order enabling him to foreclose the mortgage and has continued in possession of the property, a fresh suit for redemption would be competent to the mortgagor or his successor in interest. (*Mirza and Broomfield, JJ.*) BADRUDDIN *v.* SITARAM. **32 Bom.L.R. 933. A.I.R. 1930 Bom. 401.**

—Redemption—Suit for.

———*Redemption suit—Mortgagor failing to comply with preliminary decree—Second redemption suit during the continuance of first suit is not maintainable.*

A mortgagor, who has failed to comply with the terms of a decree in a redemption suit filed by him, is not entitled during the continuance of that suit, or before the final decree in that suit has become incapable of execution, to maintain a second suit for redemption of the same mortgage: 24 All. 44 and A.I.R. 1922 All.377, Dist. (*Iqbal Ahmad, J.*) ABDUL KARIM *v.* DURGA PRASAD. **100 I.C. 324= A.I.R. 1927 All. 305.**

———*Three usufructuary mortgages to A, B and C—C redeeming A—B seeking to redeem C as A—C resisting for about 15 months but finally submitting—Suit by C for redeeming B after his period of mortgage is not premature and B is not entitled to add 15 months to his period.*

Mortgagor effected a usufructuary mortgage in favour of *A* who has to enjoy possession for 12 years. Then he effected a second usufructuary mortgage to

MORTGAGE—Rights of mortgagee—Right to proceed against properties.

the expiry of a certain period, the mortgagee can fall back on the simple mortgage and enforce it, in case the mortgagor does not fulfil the obligation, he had undertaken.

Where the condition in a simple mortgage for three years was that if the mortgagor failed to pay yearly interest for two years the mortgagee would be entitled to possession of the mortgaged property and interest would cease to run thence forward and the mortgagor made default in paying the interest and also did not give possession to the mortgagee,

Held, that the mortgagee was entitled to interest also after the date when he became entitled to the possession of the mortgaged property. 8 A.L.J. 594; 16 O.C. 90, Rel. on; 18 O.C. 10 and 1 O.L.J. 263 Dist. (*Kanhaiya Lal, J.C.*) DAL CHAND *v.* SITA RAM. **65 I.C. 449=8 O.L.J. 643= A.I.R. 1921 Oudh. 216.**

—Rights of mortgagee—Right to proceed against properties.

———*Mortgagee can enforce whole security against any property he likes—Equities, if any of purchasers of equity of redemption can be gone into only in separate suit.*

The decree-holder has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases, and if any question of equity arises between the decree-holder and the persons to whom the equity of redemption in the mortgaged properties or in any of them may have subsequently become vested, that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. It is quite true that each parcel of the mortgaged properties is liable rateably to its value and that the principle applies with equal force where the mortgagee himself buys the equity of redemption in one or more of such parcels or releases any part of the security but an enquiry as to rateable distribution of the mortgage debt cannot be made in execution proceedings without serious complications. (*Das and Adami, JJ.*) RAI SAHEB SARJULAL *v.* BAIJNATH PRASHAD SINGH. **71 I.C. 26=1923 P.H.C.C. 6=3 Pat. L.R. (Civ.) 245= 6 P.L.T. 390=A.I.R. 1923 Pat. 44.**

—Rights of mortgagee—Sale.

When a mortgagee demands payment of the mortgage money, he should be in a position to give back the mortgaged property and allow the mortgagor to redeem, and where there has been a wrongful sale it is not open to the mortgagee, who has put it out of his power to allow the mortgagor to redeem, to sue the mortgagor for recovering the balance of the mortgage-money: (1859) 27 Beav. 349; (1925) A. C. 489, Ref. (*Kumaraswami Sastri and Krishnan, JJ.*) PURASAWALKAM HINDU J. S. NIDHI *v.* KUDDUS SAHIB. **94 I.C 860=23 M.L.W. 476= A.I.R. 1926 Mad. 841.**

———The mortgagee is entitled to bring the properties to sale in any order he chooses. His motives cannot be scrutinized. (*Ramesam and Jackson, JJ.*) T. SUBBA RAO *v.* M. LAKSHMINARAYANA. **92 I.C. 593=22 M.L.W. 389= A.I.R. 1925 Mad. 1214.**

———*Mortgage property—Division — Mortgagee's right to sell any portion is not impaired if he is not party to division—Part owner redeeming can claim contribution from others.*

Where the mortgagee has been no party to the division of the mortgaged property, the principle, that the mortgagee has the right to sell a portion of the mortgaged property to recover the whole amount due on the deed, holds good, whether the division has been the result of a voluntary or involuntary transfer. The owner of the portion sought to be sold, if he redeems, can claim contribution from the owners of the remainder. (*Gokul Prasad and Stuart, JJ.*) SOTI SURAJ MAL *v.* THANSINGH. **64 I.C. 451= 44 All. 146=19 A.L.J. 917=A.I.R. 1922 All. 352.**

MORTGAGE—Rights of mortgagee—Title.

———Where a due date is fixed for payment of the mortgage-money in a mortgage-deed the mortgage is not a pure usufructuary mortgage and the mortgagee is entitled to sue for sale immediately after the due date has passed even though he still remains in possession of the property. (*Coutts and Ross, JJ.*) JAG SAHA *v.* MT. RAM SAKHI KUER. **65 I.C. 666= 3 Pat. L.T. 332=1 Pat. 350=1922 P. H.C.C. 58= A.I.R. 1922 Pat. 167.**

—Rights of mortgagee—Satisfaction.

———*Money received by virtue of security need not always be applied to satisfy the mortgage, but may be applied to satisfy unsecured debts also.*

The suit was brought for enforcing a mortgage executed by the defendants Nos. 1, 2 and 3 in favour of the plaintiff. Twenty-four items of property were mortgaged. Out of these, two items were acquired under the Land Acquisition Act in 1915 and the amount of compensation awarded was less than the mortgage-money. The plaintiff had two unsecured debts due from the mortgagors. The mortgagors wanted that the compensation money should be appropriated in full payment of the unsecured debts and the balance towards part satisfaction of the mortgage-debt. The mortgagees agreed and the unsecured debts were paid off with a portion of the compensation money. In 1916, the contesting defendants Nos. 4, 5, 6, 7 and 10 with some other defendants purchased the equity of redemption in some of the mortgaged properties subject to the mortgage and they were impleaded in the suit as such purchasers. Their objection was that the mortgagees were bound to give credit for the entire amount of the compensation money in reduction of the mortgage-debt.

Held: that the principle, that where the mortgagee receives any money by means or virtue of a security, it must be applied in reduction of the mortgage-debt, has no application here. (*Walmsley and B. B. Ghose, JJ.*) KUSTEA LOAN OFFICE LTD., *v.* ANANDA CHARAN CHACKRABARTY. **77 I.C. 26= 27 C.W.N. 763=A.I.R. 1923 Cal. 681.**

—Rights of mortgagee—Simple mortgage.

Where subsequent to a simple mortgage the mortgagor sells the mortgaged property to a third person and afterwards the mortgagee purchases the property in execution of his mortgage decree to which the purchaser is not a party, the mortgagee is not entitled to eject the purchaser. His proper remedy is a suit to enforce his mortgage against the purchaser. (Case-Law discussed.) (*Robinson, C. J. and Duckworth, J.*) S. P. S. CHETTY FIRM *v.* MAUNG PO AUNG. **66 I.C. 562=11 L.B.R. 119= A.I.R. 1921 L.B. 61.**

—Rights of mortgagee—Title.

———*Mortgagee can't dispute mortgagor's title to property.*

A person sold two properties, A and B to another who conveyed the properties subsequently to the transferor's wife. The wife mortgaged the properties to the defendant. Subsequently a creditor of the original owner of the properties sued him, his wife and the defendant, and obtained a declaration that the first sale by the owner of the properties was a bogus one. Then a money decree was obtained by the defendant against the original owner of the properties

MORTGAGE—Rights of Mortgagee—Transfer by Mortgagor.

and his wife but it was executed against their son as both of them were dead. In execution, property A was sold and the auction-purchaser conveyed it to the defendant. Subsequently the plaintiff who was the daughter of the original owner of the properties sued to redeem the mortgage created by the original owner's wife. The defendant contended that the real owner was not the mortgagor but that her husband was the real owner and that property A having been sold in execution was not amenable to the plaintiff's claim.

Held: that the defendant being mortgagee was not entitled to dispute the title of the mortgagor *viz.*, the title of the original owner's wife and that for the purposes of the suit it must be taken that she was the owner, that the sale of property A in execution of the money decree against the husband and the wife represented by their son was not void and invalid and the sale could not be invalidated merely on the score of the omission to bring the plaintiff as heir of the mortgagor on the record and that the plaintiff was entitled to redeem the property B. (*Shah, Ag. C. J. and Fawcett, J.*) MADHAVRAO HARBAJI THAKUR *v.* AMABABAI LAXMAN JADHAV. **85 I.C. 193=26 Bom. L.R. 1210=A.I.R. 1925 Bom. 125.**

—Rights of Mortgagee—Transfer by Mortgagor.

The purchaser of a mortgaged property from the mortgagor is clearly under no personal obligation to pay to the mortgagee of the property, or a purchaser of his interest, the money due by the mortgagor. (*Rutledge, C. J. and Brown, J.*) T. C. BOSE *v.* OBEDUR RAHMAN CHOWDHURY. **111 I.C. 132=6 Rang. 297=A.I.R. 1928 Rang. 189.**

———Where the mortgagor sells his interest in the mortgaged property after a final decree for sale is passed, it does not affect the rights of the decree-holder to realise the money. (*Gokul Prasad and Stuart, JJ.*) RAM CHARAN DAS *v.* KANHAI LAL. **63 I.C. 144 (All.).**

—Rights of Mortgagor.

———*Lease by mortgagor to mortgagee's nominee—Direction to lessee to pay rent to mortgagee—Sub-lease to mortgagor on payment of peshgi—Suit on mortgage—Right of mortgagor to have the peshgi adjusted towards rent.*

The mortgagor leased the mortgaged properties to a nominee of the mortgagee directing the lessee to pay the rent to the mortgagee. Subsequently after some years, the mortgagor took the properties on sub-lease paying a sum of money as peshgi. *Held*, in a suit on mortgage, that the mortgagor was entitled to have the peshgi adjusted towards rent due on the mortgage. (*Ross and Wort, JJ.*) UPENDRA NATH BASU *v.* THAKUR PRASAD SINGH. **113 I.C. 715.**

———*Lease by mortgagor—Rent paid in advance—Sale of mortgaged property by mortgagee—Auction-purchaser is entitled to recover rent from date of sale.*

A lessee cannot resist a suit for ejectment at the instance of an auction-purchaser from a prior mortgagee or refuse to pay rent which has accrued due since the purchase on the ground that it has been paid to the mortgagor in advance: 20 C.W.N. 350: 17 C.L.J. 384; A.I.R. 1925 Cal. 251; and A.I.R, 1926 Cal. 204; Rel. on. In order to get the benefit of the protection of S. 50, T. P. Act, the tenant must pay rent as rent and must not pay rent in advance which in the circumstances is a mere loan to the mortgagor: A.I.R. 1926 Cal. 204, Foll. (*Rupchand Bilaram, A.J.C.*) OFFL. ASSIGNEE *v.* ABDUL HUSSAIN. **107 I.C. 209=A.I.R. 1928 Sind 95.**

MORTGAGE—Shares.

———*On payment debtor has a right to the return of the bond.*

The debtor, on paying the bond, has a right to the possession of the instrument for his own security and as his voucher and discharge in his account with the bond-holder. If, upon an offer of payment, the bond-holder should refuse to deliver up the bond, the debtor may retract his offer and retain his money. The debtor has the same right though he is not ready at the due date, but is ready afterwards, and his right is not varied if the payment is to be made under a compulsory process of law. (*Walsh and Pullan, JJ.*) MD. ZAFAR *v.* ZAHAR HUSAIN. **97 I.C. 82=49 All. 78=24 A.L.J. 964=A.I.R. 1926 All. 741.**

———In the absence of any express power of leasing given in the mortgage deed, or by other express agreement between the mortgagor and the mortgagee, the mortgagor in possession has no power to grant leases of the land. (*Marten, J.*) RUSTOMJI *v.* KESHAVJI. **98 I.C. 436=28 Bom. L.R. 1162=A.I.R. 1926 Bom. 567.**

———A mortgagor has very limited power of granting leases after the execution of a mortgage. (*C. C. Ghose, J.*) KIRAN CHANDRA BOSE *v.* DATT AND CO. **85 I.C. 522=40 C.L.J. 500=29 C.W.N. 94=A.I.R. 1925 Cal. 251.**

—Shares.

———*Mortgage money advanced by two persons and their interests separately specified—Their rights in the mortgaged property will be proportionate to their interests.*

Ordinarily a mortgage is treated as indivisible as between a mortgagor and a mortgagee or the persons who represent their rights; but as between the co-mortgagees themselves or their successors-in-interest their rights are determined by and correspond to such specification of interests as may be contained in the mortgage deed. When a property is mortgaged to two persons, who advance the consideration in certain proportion and one of them is separately redeemed without any objection from the other, the mortgage is split up and the latter can recover his money only from the proportionate part of the mortgaged property. (*Kanhaiya Lal and Ashworth, JJ.*) PARTAB *v.* NEHAL SINGH, **96 I.C. 134=A.I.R. 1926 All. 676.**

———*Undivided share mortgaged—Lands going to mortgagor's share liable.*

The rights of a mortgagee of an undivided share in land can be enforced against lands which under a partition have been allotted in lieu of such share whether lands be in the possession of the mortgagor or one who has purchased his right, title and interest: 1 I.A. 106 (P.C.), Foll. (*Stuart, C. J. and Raza, J.*) LACHHMAN PRASAD *v.* MOHAMMAD ALI MOHAMMAD KHAN. **98 I.C. 1039=3 O.W.N. Sup. 232.**

———*Several mortgagees having specified shares—Single suit by mortgagor, for redemption—Suit is maintainable.*

Where in the mortgage-deed the share of each of the joint mortgagees is set out and specific portion of the property is made security for each, but where it is expressly provided that the mortgage-money should be paid in a lump sum, all redemption proceedings having been taken together.

Held: there is no impediment in law to the redemption of such a mortgage by one suit. The transaction does not amount to nine separate mortgages and for redemption of all these mortgages one suit is maintainable. (*Rafique and Lindsay, JJ.*) LACHMI PRASAD *v.* GOKUL. **66 I.C. 206=20 A. L.J. 157=A.I.R. 1922 All. 80.**

MORTGAGE—Splitting up.

—Splitting up.

Once a joint mortgage decree is passed against several items of property the mortgagee decree-holder is entitled to realise the entire amount from any part of these properties and he can also sell them in any order that he wishes to choose. Neither the judgment-debtor nor any transferee *pendente lite* from him is entitled to have the decretal amount split up and the liability apportioned. (*Sulaiman and King, JJ.*) MOTI CHAND *v.* MAHABIR PRASAD.

A.I.R. 1930 All. 638.

———*Mortgagee relinquishing his claim on a portion cannot throw whole burden on remainder.*

Mortgagee after relinquishing his claim on a portion of the mortgaged property cannot throw the whole burden of the mortgaged debt on the remainder of the property : 40 Mad. 968, not Foll.; 1 C.L.J. 337, Foll. (*B. B. Ghose and Panton, JJ*). MUKTAKESHI PAL *v.* RAMANI MOHAN.

98 I.C. 504=A.I.R. 1927 Cal. 195.

—Sub-mortgagee.

———*Sub-mortgage by mortgagee—Acknowledgment of mortgage debt.*

A sub-mortgage by the mortgagee can amount to a valid acknowledgment that the property was on that date held under mortgage right. (*Marten, C. J., Mirza and Broomfield, JJ.*) MOTILAL JADAV *v.* SAMAL BECHAR. **32 Bom. L. R. 1096= A.I.R. 1930 Bom. 466 (F.B.)**

———*Mortgagee creating registered sub-mortgage-Payment towards mortgage is good as against the sub-mortgagee.*

When a mortgagee sub-mortgages his mortgage to another person without the knowledge of the original mortgagor and the original mortgagor pays off the mortgage amount to the mortgagee the sub-mortgagee's rights against the land are extinguished. The sub-mortgage is only good to the extent of the amount due on the original security, on the payment of which the security is released : 29 Bom. 199, Rel. on. (*Das, J.*) MAUNG SHAU HPYU *v.* U. PO THAW

105 I.C. 474=5 Rang. 749=6 Bur. L.J. 214= A.I.R. 1928 Rang. 30.

———A sub-mortgagee in possession is entitled to retain possession until redemption of his sub-mortgage and a payment to the mortgagee with notice of the sub-mortgage could not affect the sub-mortgagee. (*Duckworth and Godfrey, JJ.*) MA MYAT GYI *v.* MA MA NYAN. **84 I.C. 984=2 Rang. 561= A.I.R. 1925 Rang. 140.**

———Payment by mortgagor to mortgagee discharges mortgage where sub-mortgagee gave no notice to mortgagor. It follows that on such an extinction taking place the sub-mortgagee has no remedy left against the property. (*Wazir Hasan and Cuming, A. J. Cs.*) MOHAN SINGH *v.* PANDIT SEWA RAM.

75 I.C. 579=10 O.L.J. 424=A.I.R. 1924 Oudh 209.

———*Sub-mortgagee's rights against stranger.*

A sub-mortgagee, after redemption of the original mortgage, has no further rights against the mortgaged property and his remedy, if any, is against the sub-mortgagor. 20 Cal. 241 Foll. But the sub-mortgagee can still pursue his rights against any property in the hands of the sub-mortgagor into which the security was converted. The sub-mortgagee can, as against a stranger, subrogate himself only to such rights as his sub-mortgagor can have as against the stranger and is bound by the decree between his sub-mortgagor and the stranger and cannot get rid of it by showing that it was erroneous unless the decree was obtained by fraud and collusion and unless really what was decree in favour of the stranger in fact belonged to the sub-mortgagor. (*Rameşam, J.*) RARICHAN *v.* DAMAYANTI.

MORTGAGE—Subrogation.

72 I.C. 638=17 M.L.W. 380=1923 M.W.N. 87=. 32 M.L.T. 273=A.I.R. 1923 Mad. 440=44 M.L.J. 363

———A sub-mortgagee can ask for a sale of the original mortgagor's interest and not only the sub-mortgagor's interest in the property mortgaged to him, 29 All. 385 F.B. Dissent ; 9 C.L.J. 429 and 50 Mad. 35 Foll. (*Kotval. A. J. C.*) SINGHAI KANCHEDILAL *v.* SHRIDHAR. **72 I.C. 427=19 N.L.R. 64=7 N.L.J. 36= A.I.R. 1923 Nag. 222.**

—Subrogation.

———A executed a mortgage deed in respect of certain property in favour of B. Later on A executed a sale deed in respect of the property (including the mortgaged property) in favour of C certain sum out of the consideration being left with C to be paid to B. C paid the money satisfying the mortgage in favour of B. But D already held a decree against H and had attached the property (which C had purchased) in execution of that decree. The sale to C was held void and D purchased the property in the execution sale. C thereupon brought a suit claiming for refund of the amount paid in cash by him to B from B in the first instance and failing him from A.

Held that the rule of subrogation applied to the case and C had stepped into the shoes of B to the extent of payment made by him to B. Payment by C to B was to be regarded as a purchase *protanto* of his rights and C's remedy in respect of the amount paid by him was to enforce payment of it against the property covered by the mortgage.

Held also that C was not entitled to refund on the ground that the consideration had failed as the consideration for the payment was not the sale deed in favour of C but the mortgage held by B and C had only acquired the rights of B.

Held further, that although there was a clause in the sale deedt hat A would be responsible for loss or damage suffered by C there was hardly any loss or damage if C had been subrogated to the right of B and had acquired a charge on the property.(*Bisheshwar Nath and Pullan, JJ.*) DWARKA v. ALI MAHOMED KHAN. **7 O.W.N. 610=A.I.R. 1930 Oudh 397.**

—The question of subrogation is one of intention and has to be gathered with reference to the terms of the various documents, though, of course, there is always the presumption that a person discharging a prior mortgage intends to keep it alive for his benefit. Where a person raises money to pay off a prior mortgage and the mortgagee pays as the agent of the mortgagor there can be no question of subrogation.The mere fact that a mortgagee keeps money in his hands to pay off a prior encumbrance and does not run the risk he would otherwise incur if he pays money to the mortgagor to pay off the prior encumbrance and he does not do so, will not make the mortgagee an agent of the mortgagor. (*Kumaraswmy Sastri, J.*) GURUMOORTHI IYER *v.* P. S. SUBRAMANIAM.

107 I.C. 401 (Mad.)

———The doctrine of subrogation applies to the case of substitution of one creditor for another by operation of law, and where one of the several mortgagors redeems the mortgaged property he has a charge on the share of each of the other co-mortgagors. (*Daniels and Wazir Hasan, A. J. Cs.)* JAI KISHORI *v.* MUHAMAD ALI MUHAMAD KHAN. **60 I.C. 560= 7 O.L.J. 620.**

—A person who pays a mortgage not for his protection but to perform a covenant cannot be substituted to the mortgagee rights. (*Das and Ross, JJ.*)

MORTGAGE—Substituted security.

AKHAURI PREM NARAIN *v.* KULDIP SINGH.

62 I.C. 621 (Pat).

—Substituted security.

———The rule of "substituted security" is based upon the principle that the property mortgaged has taken another shape not by the tortious action of a party who was a stranger to the original contract but by the voluntary action of the mortgagor himself as by taking another property on partition or by operation of law as in the case of (1) compensation money obtained in respect of the mortgage property under the Land Acquisition Act or (2) surplus sale proceeds of the mortgage property left over, after satisfaction of the prior mortgage debt or (2) pre-emption price obtained on sale of the mortgaged holding under the provisions of the C. P. Tenancy Act. The doctrine of "substituted security" does not extend to cases of wrongful conversion of the mortgage security by a person other than the mortgagor, though he may be an assignee of the equity of redemption: 1 I. A. 106 (P. C.) and 12 N. L. R. 90 Ref. (*Subhedar, A. J. C.*) TRETANAH *v.* AJODHYA PRASAD. **A.I.R. 1930 Nag. 139.**

———The right of hypothecatee of chattels does not attach itself to chattels purchased with the sale-proceeds of hypothecated chattels in absence of a contract that he should have that right against the substituted article. (*Devadoss, J.*) KANDASWAMI CHETTI *v.* ADIMOOLA CHETTI. **85 I.C. 277 = A.I.R. 1925 Mad. 275 = 47 M.L.J. 704.**

———*Substitution on partition is allowed to the extent of mortgagor's interest of joint property.*

Three members A Z and S of a Mahomedan joint family mortgaged part of joint property. On a subsequent partition the whole joint property was held liable for all the debts incurred by several members of the family. In a suit by mortgagee, it was found that the claim under mortgage was barred by limitation against two of the members A & Z but by force of an acknowledgment it was within time as against the third S.

Held: that the true way to find out the substituted security is by determining the ratio which the value of the shares owned by S in the mortgaged properties at the time of the partition bore to S's actual share in the entire family property. (*Sulaiman, Lindsay and Kanhaiya Lal, JJ.*) SHEO PRAKASH *v.* ALA-UD-DIN. **84 I.C. 599 = 5 L.R.A. Civ. 441 = A.I.R. 1924 All. 579.**

—Substitution of new mortgage.

Usufructuary mortgage—Further loan from mortgagee stipulating to repay at redemption—Mortgagor must pay further loan also at redemption. A. I. R. 1922 All. 174 (F. B.), Foll. (*Mears, C. J., and Dalal, J.*) HARDAYAL LAL *v.* GANGA KOERI. **102 I.C. 202 = 8 L.R.A. Rev. 161 = A.I.R. 1927 All. 743.**

—Suit on.

———*Limitation—Acknowledgment.*

An acknowledgment made by one of the heirs of the mortgagee who have divided the mortgage property among themselves without the consent of the mortgagor is binding on him or his heir so far as regards the property in his possession though it may not be binding on the co-heirs of the mortgagee. (*Marten C. J. Mirza and Broomfield, JJ.*) MOTILAL JADAV *v.* SAMAL BECHAR. **32 Bom. L. R. 1096 = A.I.R. 1930 Bom. 466 (F. B.)**

———*Mortgage decree under Dekhan Agriculturists Relief Act*, 1879.

A mortgage decree under the Dekkan Agriculturists Relief Act does not require to be made absolute before it can be treated as final and effective. (*Mirza and Broomfield, JJ.*) RAMKRISHNA *v.* RAMCHANDRA. **32 Bom. L.R. 1093.**

MORTGAGE—Suit on.

Where the representatives in-title of the mortgagor bring a suit for possession on the ground that the mortgage was not binding on them but they could not successfully impeach the mortgage, their suit should not be dismissed but they should be allowed to redeem the mortgage. (*Shadi Lal, C.J. and Agha Haider, J.*) SHER SINGH *v.* SUNDERSINGH. **A.I.R. 1930 Lah. 747.**

———*Parties—Attaching creditor.*

The plaintiff who was a money decree-holder against the judgment-debtor mortgagor attached the mortgaged property in execution of his decree. Pending the attachment the defendant mortgagee filed a suit upon his mortgage and obtained a preliminary decree. To this suit however the plaintiff was not made a party. Subsequently the plaintiff brought the property to sale in pursuance of the attachment and purchased it himself. The defendant thereupon proceeded to obtain a final decree and purchased the same property at the sale held by Court in execution of that decree. The plaintiff filed a suit alleging that the defendant was in unlawful possession of the property and claimed that he was entitled to redeem the property from the mortgage in favour of the defendant.

Held that the plaintiff was not a necessary party to the mortgage suit within the meaning of O. 34, R. 1, 43 Mad. 696 and 44 M. 232 approved. (*Beasley, C.J., Anantakrishna Ayyar and Curgenven, JJ.*) SUBRAMANIAN CHETTIAR *v.* SINNAMMAL. **1930 M.W.N. 798 = 32 L.W. 395 = A.I.R. 1930 Mad. 801 (F.B.)**

———*Mortgage held invalid—Decree on personal covenant.*

A personal covenant to pay may be proved by a mortgage invalid for defect of attestation; and a trial court can, on finding a mortgage to be invalid, give a decree on the personal covenant which it contains provided that it be not barred. (*Curgenven and Bhashyam Ayyangar, JJ.*) OFFICIAL ASSIGNEE, MADRAS *v.* JAGANNATHAM PILLAI. **1930 M.W.N. 865.**

———*Death of mortgagor—Right of legal representative to raise question of title adverse to the mortgagor.*

In a suit instituted for the recovery of money due on the basis of a mortgage, the legal representatives of the original mortgagor are not entitled to raise any objection which involve an attack on the rights of the mortgagor; on the other hand they are merely entitled to raise such objections as are open to the person to whom they represent, that is, the original mortgagor. The legal reprnsentatives of the mortgagor is therefore not competent to raise any objections claiming title adversely to the mortgagor whom they represent. Such an objection can be raised by them under S. 47 of the Civil Procedure Code in the stage of the execution proceedings. (*Jai Lal, J.*) MAHOMED IQBAL *v.* LABHA MAL. **122 I.C. 575.**

———*Personal decree.*

Held by the Full Bench (*Srivatsava, J.*, Dissenting). Where the plaintiff contains a prayer that if the money due to the plaintiff could not be obtained from the sale proceeds of the mortgaged property, the balance should be recovered from the defendant personally and a preliminary decree is passed for sale in from 4 App. of C.P.C. enacting that if the sale proceeds are insufficient the plaintiffs are at liberty to apply for a personal decree for the amount of the balance, this amounts to an adjudication between the

MORTGAGE—Suit on.

parties that the plaintiff decree-holder has an actual right to such a personal decree and as the existence of that right is detrimental to the defendant judgment-debtor the latter must appeal against the preliminary decree and if he does not do so he cannot resist a subsequent application made under O. 34 on the ground that the plaintiff decree-holder is not entitled to a personal decree.

Construction of decrees with reference to forms and pleadings in such cases discussed.

Per *Srivastava, J.*: dissenting : The Court in granting the plaintiff's prayer to reserve to himself the liberty of making an application under O. 34, R. 6 does not judicially determine or adjudicate upon any question in controversy between the parties. (*Hasan, C.J., Raza, Bisheshwar Nath, Pullan and Nanavutty, JJ.*) RAM NATH *v.* NAGESHUR SINGH. **7 O.W.N. 774= A.I.R. 1930 Oudh 378 (F.B.)**

———*Mortgage—Default clause—Effect—C. P. C. O. 2, R. 2—Mortgage—First suit for interest—Second suit for principal and further interest.*

Per *Kumaraswami Sastri, J.*—In cases where there is power given to claim the payment due on the mortgage deed and where demand is necessary, the money will not become payable until the demand has been made. Where the default clause is for the benefit of the mortgagee, he is not bound to enforce the clause but can waive it : A. I. R. 1925 Mad. 1120; 39 Mad. 981 and A. I. R. 1926 Mad. 160, Rel. on.

The words "when required by you" would mean that an option is created in favour of the mortgagee to enforce the penal provision, so that the cause of action to recover the principal and the enhanced interest within the two years period would not arise automatically upon default in payment of interest being made but only on demand. (*Kumaraswami Sastri and Curgenven, JJ.*) SIVA SUBRAMANIA *v.* NAGAPPA PILLAI. **102 I. C. 187=38 M. L. T. 211= 25 M. L. W. 615=A. I. R. 1927 Mad. 580= 52 M. L. J. 636.**

———The Court is not concerned for the purpose of determining the issues in a mortgage suit whether some third party has a title adverse to that of the mortgagor. (*Dawson Miller, C. J. and Foster, J.*) BRIJ RATAN DAS *v.* RAGHUNANDAN GIR. **71 I. C. 944=1923 P. H. C. C. 49= 1 Pat. L. R. 225=4 P. L. T. 457= A. I. R. 1923 Pat. 203.**

———In a mortgage suit, the legal representatives of the deceased mortgagor who claimed to be the reversioners to the property, contended that the mortgagor had no authority to mortgage the property.

Held, that the question should be decided in a separate suit. (*Mookerjee, C. J., and Fletcher, J.*) KALIDAS ROY *v.* GIRINDRA MOHAN BAKSHI. **63 I. C. 92=33 C. L. J. 301=25 C. W. N. 192= A. I. R. 1921 Cal. 343.**

—Suit on Mortgage.

———*Extinguishment of mortgage.*

A mortgage will not be extinguished until there has been a sale under the mortgage decree. (*Adami, J.*) LAKHAN CHOUDHRY *v.* BACHA LAL. **126 I.C. 295= 11 P.L.T. 500=A.I.R. 1930 Pat. 451.**

———In a suit to enforce a mortgage of a house in the abadi, persons were joined as defendants as being subsequent mortgagees of the house. They alleged that they were proprietors of the patti in which the house was situated and contended that the owner mortgagor was incompetent to mortgage the house without their consent.

MORTGAGE—Suit—Parties.

Held : that the Court could go into the question of paramount title claimed by them as malguzars : 6 N. L. R. 156 and 13 N. L. R. 69 ; 44 Bom. 698, Expl. ; 40 All. 584, not Foll. (*Jackson, A. J. C.*) GADURAM *v.* BHAWANISAO. **121 I.C. 666= 13 N.L.J. 1=A.I.R. 1930 Nag. 89.**

———*Purchaser of portion of mortgaged property —Ouster of, by execution purchaser—Remedy.*

A purchaser of a portion of the mortgaged property from the mortgagor subsequent to the mortgage, who was not made a party to the mortgage suit but who has been ousted from the possession of the mortgaged property by the purchaser in execution of the mortgage decree is not entitled to recover possession on the basis that the execution purchaser is a trespasser. His only remedy is to redeem such purchaser : 4 C. W. N. 452 and 6 C. L. J. 609. not Foll.; 18 Cal. 164 (P. C.), Rel. on. (*B. B. Ghose and Cammiade, JJ.*) BHAGABAN CHANDRA *v.* TORAK CHANDRA. **100 I.C. 420=45 C.L.J. 4= A.I.R. 1927 Cal. 259.**

———In a mortgage suit it is for the mortgagee in possession to prove the sums due to him and also to disprove any amounts that he is alleged, with any reasonable show of truth, to have received as nazarana. (*Hallifax, A. J. C.*) RAMLAL *v.* NARAYAN RAO. **99 I.C. 630=A.I.R. 1927 Nag. 138.**

———When the mortgagee who was entitled to recover the whole mortgage money with costs and damages in case he was not given possession, was given possession only of half the property, but he delayed in bringing the suit which he was entitled to bring.

Held : that he could not be held to have acquiesced in the dimunition of his security merely because he delayed for some years in bringing the suit. (*Neave, A. J. C.*) BASAWAN *v.* NATHA. **1 O.W.N. 319 82 I.C. 747=11 O.L.J. 452=A.I.R. 1925 Oudh 30.**

———If the mortgage is totally denied, the plaintiff cannot prove the *factum* of the mortgage without producing the original mortgage deed, but if the defendants do not deny the *factum* of the mortgage but what they allege is that the mortgage has been discharged by payment, it is necessary for the Judge to find whether the mortgage had in fact been discharged or not. The non-production of the original mortgage might be an important factor in considering whether the mortgage had been discharged or not, but that is no ground in itself for dismissing the suit on the mortgage in such a case. (*Banerji and Gokul Prasad, JJ.*) HIKMATULLAH KHAN *v.* ABDUL AZIZ KHAN. **61 I.C. 412=19 A.L.J. 185= A.I.R. 1921 All. 218.**

—Suit—Parties.

In general a prior mortgagee is not a necessary party to an action on the second mortgagee. It is only if the prior mortgage is expressly or by necessary implication impugned that he is called upon to defend his right as a prior mortgagee. The auction purchaser cannot plead want of notice of the prior registered mortgagee. It cannot be held that the prior mortgagee's rights were impliedly negatived in a suit on the later mortgage. (*Banerji and Niamatullah, JJ.*) FAZAL RAB *v.* MANZOOR AHMAD. (1930) **A.L.J. 1222.**

After a suit has been brought on a mortgage and decided, a subsequent suit by the mortgagee impleading mortgagors and alienees subsequent to plaintiff, not impleaded in the previous suit, is entirely mis-

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conceived. (*Wallis, C. J., Seshagiri Aiyar and Abdur Rahim, JJ.*) NAMBERUMAL CHETTIAR *v.* RAGHAVA CHARIAR. **71 I.C. 390=14 M.L.W. 563= A.I.R. 1921 Mad. 701.**

—Miscellaneous.

It is the law of the suits which governs the relations of the parties in respect of a contemplated mortgage transaction.

Quaere—Whether the rule of law embodied in S. 58, T. P. Act as applicable to the Punjab is accepted by the Bahawalpur Courts. (*Shadi Lal, C. J. and Agha Haidar, J.*) GULAB MAL *v.* SHAHAUDDIN. **31 P.L.R. 239=A.I.R. 1930 Lah. 549.**

———*Costs—Addition of to security—When made personally payable.*

Unless there is an express condition in the mortgage as to payment of costs, then in the absence of special circumstances those costs are merely added to the mortgage security and are not payable by the mortgagor personally; but where the mortgagor has chosen to raise an untenable defence, it is proper to direct him to pay the costs if the security is not sufficient. It makes no difference even if the mortgagor is dead and is represented by his legal representatives. (*Marten, C. J. and Blackwell, J.*) VRAJLAL *v.* VENKATASWAMI. **108 I.C. 794=52 Bom. 459= 30 Bom. L.R. 402=A.I.R. 1928 Bom. 123.**

———*Mortgage—Suit to enforce barred—Debt, if extinguished.*

A separate claim by the creditors on the mortgage may be barred but their right to the money due to them under that bond cannot be held to have been extinguished so long as their lien by possession lasts.

There is in law no right without a remedy; and, if all remedies for enforcing a right are gone, the right has in point of law ceased to exist. In the case of a debt the ordinary and universal remedy is by action against the debtor. There may, however, and sometimes does, exist another remedy, not by action against the debtor, but arising out of the possession of property of the debtor which by law or contract may be detained by the creditor until the debt is paid. This latter remedy may exist, although the remedy by action is barred; and in that case the debt continues to exist so far as is necessary for the enforcement of this right of lien but not for enforcing the remedy by action: In re *Hepburn Ex parte Smith*, 14 Q. B. D. 394, Foll. (*Wasir Hasan and Raza, JJ.*) RAM RATAN LAL *v.* ADITYA PRASAD. **112 I.C. 481= 3 Luck. 459=5 O.W.N. 178= A.I.R. 1928 Oudh 273.**

———*What passes—Decree—Compromise.*

Where a suit was decreed *ex parte* against the father mortgagor and on compromise against the sons and the ijaradars and by the compromise it was expressly agreed that on failure to pay the entire money due to the plaintiffs the plaintiffs should be able to bring the mortgaged properties to sale and realise the money.

Held: that this implied an agreement on the part of the sons to put their shares at the disposal of the decree-holders and therefore amounted to a specification of their shares. Lapse or reduction on account of the death of one of the co-parceners does not affect the shares on date of mortgage. The sale of the ijara interest followed as a matter of course because it was subsequent to the mortgage. (*Jwala Prasad and Ross, JJ.*) BADRI NARAIN SINGH *v.* DWARKA PRASAD. **78 I.C. 630=1924 P.H.C. C. 65= 5 Pat. L.T. 565=A.I.R. 1924 Pat. 353.**

———Surrender of possession of mortgaged property by the decree-holder or his rendering account is not necessary for execution. (*Das and Ross, JJ.*) NRIPENDRANATH CHATTERJEE *v.* JHUMAK MANDAR. **80 I.C. 588=3 Pat. 221=4 P.L.T. 694= 2 Pat. L.R. 9=A.I.R. 1924 Pat. 263.**

MORTGAGOR AND MORTGAGEE—Agreement after foreclosure.

———An award though unattested and unregistered, can create a legal and valid mortgage. (*Kennedy, J. C. and Madgavkar, A. J. C.*) HOTCHAND BALCHAND *v.* KISHAN CHAND. **83 I.C. 548= 17 S.L.R. 178= A.I.R. 1924 Sind 23.**

———The fact that a mortgage stood in the names of two persons goes against the case that the estate was impartible. (*Ashworth, J. C. and Simpson, A. J. C.*) THAKUR RUDRA PRATAP NARAYAN SING *v.* THAKUR NORMAN PRASAD SING. **74 I.C. 225= 9 O.L.J. 552=A.I.R. 1923 Oudh 61.**

———*Property temporarily handed over for securing debt can be recovered on payment of debt.*

Plaintiff made over certain land to defendant 1, by way of security without a regular mortgage and without a registered deed. Defendant 1 sold it to defendants 2 and 3, also without registered sale deed. First defendant admitted the claim. *Held*, the transaction cannot be treated as a mortgage. Plaintiff is entitled to redeem in a popular sense, but not in the legal sense of redeeming mortgaged property. But in the absence of registered deeds neither the second and third defendants nor their vendor had obtained a valid title to the land. (*Pratt, J.*) MAUNG AUNG *v.* MAUNG SHWE LIN. **73 I.C. 1039=1 Bur L.J. 203= A.I.R. 1923 Rang. 51.**

———*Varieties*—Biswi *mortgage by landlord to tenant of holding*—Paramsana *rent is the balance of rent paid, after deducting the interest due on the mortgage—Extinction of right of redemption does not destroy right to claim* paramsana *rent.*

Where land held by tenant is mortgaged by the proprietor to the tenant in consideration of money paid by the latter, it is not unusual for the tenant to appropriate a portion of the rent, for which he was originally liable, towards interest due on his loan and to pay the balance, known as *paramsana*, to the mortgagor. *Biswi* is the name usually given in eastern Oudh to mortgages of this kind. The extinction of the right of redemption of this kind does not destroy the right of the mortgagor or his successors to claim the *Paramsana* as rent for the *paramsana* does not fall within the rights to which the mortgagee is entitled. (*Kanhaiya Lal, J. C.*) SAT DEO *v.* JAI NATH. **67 I.C. 808=9 O.L.J. 141= A.I.R. 1922 Oudh 75.**

MORTGAGE DECREE.

See CIVIL P. C. O. 34.

MORTGAGEE IN POSSESSION.

See T. P. ACT, S. 76.

MORTGAGE SUIT.

See CIVIL P. C. O., 34.

MORTGAGOR AND MORTGAGEE.

See also (1) MORTGAGE.
(2) T. P. ACT, Ss. 58, 101.

—Adverse possession.

Mortgagee cannot set up adverse possession against the mortgagor by executing a kabuliyat in favour of the landlord. (*Cammiade and S. K. Ghose, JJ.*) BIMALA CHARAN *v.* ABDUL RAHMAN. **114 I.C. 81= A.I.R. 1928 Cal. 825.**

—Agreement after foreclosure.

———*Foreclosure decree and formal possession—Subsequent agreement to reconvey—Mortgagor's long possession of property—Inference.*

Mortgagee obtained an absolute decree for foreclosure and formal possession of the property and got

MORTGAGOR AND MORTGAGEE—Breach of obligation.

his name mutated. Mortgagee subsequently made an oral agreement with the mortgagor to reconvey the property to him. The mortgagor remained in actual possession of the property for a long time after passing of the decree, regarded himself as the real proprietor of the property to the knowledge of the mortgagee and mortgagee himself regarded him as the virtual proprietor of the property.

Held : that although the legal title was with the mortgagee, such long and uninterrupted possession of mortgagor was in pursuance of the oral agreement between the mortgagor and the mortgagee : A. I. R. 1922 Bom. 9, Rel. on. (*Subhedar and Jackson, A. J. Cs.*) INDRARAJ SINGH *v.* CHAITRAM.

117 I.C. 271=25 N.L.R. 131=A.I.R. 1929 Nag. 194.

—Breach of obligation.

———*Breach of obligation arising out of mortgage —Damages in suit on mortgage.*

In cases where the breach consists of a contractual or statutory obligation arising out of the mortgage or annexed to the relationship of mortgagor and mortgagee created by the transaction, the defendant should be allowed to enforce his equitable remedy to claim damages in the mortgagee's suit itself.But the plaintiff would not be liable for any remote damages; the only proper way of assessing the damages would be to find out what loss the defendant would have suffered had he taken steps to remedy the breach in time. (*Munji, A. J. C.*) SHEOJI *v.* BHASKAR. **A.I.R. 1930 Nag. 166.**

—Condition of foreclosure.

Per *Boys, J.*—A mortgage was executed between parties which had a condition as to foreclosure if the mortgage money was not paid by the date agreed. In the mortgagee's suit to enforce the mortgage the trial Court held that the condition as to foreclosure must be struck out and that on its being struck out there would remain no mortgage at all. On appeal the appellate Court held that the effect of striking the condition was not to destroy the mortgage wholly but there still remained relation of mortgagor and mortgagee between parties.

Held : that the effect of the order of remand was to reduce the mortgage to a simple mortgage, (*Ashworth, J. Contra.*) (*Boys and Ashworth, JJ.*) KALIKA PRASAD *v.* AJUDHIA PRASAD. **121 I.C. 211= 1929 A.L.J. 448=51 All. 780=A.I.R. 1929 All. 421.**

—Payment to co-mortgagee.

Payments to one of two mortgagees into his private account cannot be considered as payments which would reduce the mortgage debt due to the other mortgagee and more so where there is a definite separation between the two mortgagees. (*Mukerjee and Bennet, JJ.*) UPENDRA NATH BASU *v.* KALI CHARAN MITRA. **A.I.R. 1930 All. 634.**

—Sale by mortgagor.

———*Mortgage—Clause for sale by mortgagor—* Bona fide *buyer protected.*

Where according to the mortgage deed the mortgagors are at liberty to sell any part of the mortgaged property at any time on condition that they pay the sale proceeds to the mortgagees, they convey good title to the purchaser. If they fail to pay the proceeds of the sale to the mortgagees, the purchaser cannot he held responsible for it. The mortgagees can have no remedy against the purchaser who acts *bona fide* in the belief that the mortgagors were entitled to sell the property and he is not bound to see to the performance by the mortgagors of their own part of contract with the mortgagees. (*Zafar Ali and Bhide, JJ.*) ASA RAM *v.* KISHAN CHAND.

121 I.C. 130=A.I.R. 1930 Lah. 386.

MOTOR VEHICLES ACT, (1914)—S. 5—Convictions MOTIVE.

See (1) CRIMINAL TRIAL.

(2) PENAL CODE, SS. 300-302.

MOTOR VEHICLES ACT, (VIII of 1914.) —Interpretation.

———*U. P. Rules, R. 32—Words " if any person is injured " in R. 32 govern whole clause.*

Rule 32 was made in order to provide for cases where people are injured and the words " if any person is injured " in R. 32 govern the whole of the rest of the clause and the other construction of R. 32, *viz.*, on the occurrence of any accident, if there is no police officer present, the driver or person in charge of the motor vehicle shall report the accident without delay at the nearest police station, though possible, cannot be accepted as correct. (*Young, J.*) MANSA SINGH *v.* EMPEROR. **119 I C. 570= 1929 A.L.J. 1044=10 L.R.A. Cr. 137= 30 Cr. L.J. 1085=51 All. 996= 12 A.I. Cr. R. 337=1929 Cr. C. 355= A.I.R. 1929 All. 750.**

—Offence under.

———*Offence under—S. 562, Criminal P.C., does not apply.*

Section 562 (1) (a) only applies to a certain limited class of cases such as theft and so on under the I.P.C., but does not apply to an offence under a totally different Act such as the Motor Vehicles Act. (*Marten and Madgavkar, JJ.*) EMPEROR *v.* PANDU RAMAJI. **93 I.C. 992=28 Bom. L.R. 297= 27 Cr. L.J. 528=A.I.R. 1926 Bom. 230.**

—Plying for hire.

———*Punjab Motor Vehicles plying for hire Rules (1922), Rr. 3 and 7—Plying for hire—Meaning of.*

" To ply for hire " means to exhibit a vehicle in such a way as to invite those who may desire to do so to hire it or to travel in it on payment of the usual fares and also to offer its use on payment to any member of the public thereby soliciting custom : A.I.R. 1928 Mad. 166 Foll.; English Cases considered). (*Zafar Ali and Jai Lal, JJ.*) SARDUL SINGH *v.* EMPEROR. **116 I.C. 885=30 Cr.L.J. 700= 10 Lah. 505=13 A.I. Cr. R. 123=31 P.L.R. 95= A.I.R. 1929 Lah. 422.**

—S. 4—Liability.

The person in charge of the car, though he may not be the owner, to whose orders the driver is in fact submitting at the time of the accident, or immediately thereafter, is amenable to this section. (*Walsh and Banerji, JJ.*) EMPEROR *v.* RAMANJAI SINGH. **108 I.C. 230=26 A.L.J. 331= 9 A.I. Cr.R. 341=9 L.R. A.Cr. 49=29 Cr.L.J. 357= A.I.R. 1928 All. 261.**

—S. 4—Police officer.

———*Police officer stopping vehicle need not be one engaged in regulating traffic.*

Part (a) of the section requires that a driver should stop in three sets of circumstances, firstly that traffic may be regulated, secondly that a name and address may be obtained with a view to prosecution, and thirdly for the purpose of enforcing any of the provisions of the Act, such as checking the license and inspecting a bus where it is suspected to be overloaded and it is not necessary that the police officer stopping the vehicle should be engaged in regulating traffic. (*Curgenven, J.*) RAMANUJAM NAIDU *v.* EMPEROR. **30 M.L.W. 468=2 M. Cr.C. 210=1929 M.W.N. 596= 31 Cr. L.J. 639=A.I.R. 1930 Mad. 445= 57 M.L.J. 457.**

—S. 5—Convictions.

———*Rules under R. 27-A—Conviction for breach*

MOTOR VEHICLES ACT, (1914) S. 5—Dangerous driving.

of R. 27-A—Subsequent conviction under S. 5 on same facts is not illegal.

The accused driving a motor car while under the influence of liquor, ran into another motor car and damaged it. He was tried under R. 27-A framed under S. 16 and convicted on his plea of guilty, and he was again tried for rash and negligent driving on the same facts under S. 5 and was convicted.

Held, that a breach of the R. 27-A would be committed the moment the accused was driving the car in an intoxicating state and the act of rashnes in regard to which he was convicted was a subsequent event, and that, therefore, there was nothing illegal in his being separately charged and tried for each of the two offences. (*Fawcett and Mirza, JJ.*) EMPEROR *v.* RAMA DEOJI. **112 I.C. 101=11 A.I. Cr. R. 224= 29 Cr. L.J. 981=30 Bom. L.R. 636= A.I.R. 1928 Bom. 231.**

—S. 5—Dangerous driving.

Two cars were going under 15 miles per hour along the road from South to North, and while another car came in the opposite direction from North to South, *G's* baby car, passed the two cars going towards the North. *G* was going about 25 miles per hour. The road was at the place 40 to 50 feet wide as would give ample room for 4 cars to pass abreast with any amount of room to spare. There was no traffic of any kind on the road at the time except the 4 cars. *G* was not shown to be over the wrong side of the road.

Held, that there would be ample room for a very small car like that of *G* to pass without trenching on the right hand side of the road. Even if he did go slightly over the middle line the car coming in the opposite direction had 20 feet in which to swing to its left. *G's* driving could not therefore be assumed to be reckless or negligent; an estimate speed of 25 miles per hour could not be regarded as anything out of the ordinary, on that road. (*Baguley, J.*) S. GANGULI *v.* EMPEROR. **115 I.C. 900=30 Cr. L.J. 539= 12 A.I. Cr. R. 342=A.I.R. 1929 Rang. 14.**

——Under S. 5 the accused is bound not to drive in a manner which would be dangerous to the public. In determining whether the manner of driving was dangerous to the public or not regard must be had to all the circumstances of the case and the amount of traffic which actually was at the time in the place. (*Shah and Fawcett, JJ.*) KHODABUX *v.* EMPEROR. **97 I.C. 973=28 Bom.L.R..1066=27 Cr. L.J. 1213= A.I.R. 1926 Bom. 564.**

——Where the accused saw another car approaching him on its proper side of the road and where he ought to have drawn in behind the water-cart passing in the same direction as the accused and not have attempted to force his way past it in front of the oncoming car,

Held: that such conduct on the part of the accused came within the purview of S. 5 of the Motor Vehicles Act, and that the conviction was a proper one. (*Banerji, J.*) CHARAN SINGH *v.* EMPEROR. **88 I.C. 998=23 A.L.J. 790=26 Cr. L.J. 1254= 6 L.R.A. Cr. 150= A.I.R. 1925 All. 798.**

——*Fine should be proportionate to means of accused—In case of professional drivers the best course is to exercise powers under S.* 18 (2).

The general rule is that the fine imposed on an accused person should not be excessive, having regard to his pecuniary means. The best way to stop dangerous driving by persons, who earn their livelihood by driving motor vehicles, is for the Court, on conviction of the offender, to exercise its powers under Sub-S. (2) of S. 18, under which such Court "shall cause particulars of the conviction to be endorsed" on any license held by the accused, and may (1) cancel or suspend that license, or even (2) declare the accused disqualified for obtaining a license either permanently or for such period as it thinks fit. The exercise of that power will have a very deterrent effect, especially in the case of persons who earn their livelihood by driving motor vehicles. (*Fawcett and Madgavkar, JJ.*) EMPEROR *v.* BASAPPA RACHAPPA. **90 I.C 320=26 Cr. L.J. 1536=27 Bom. L. R. 1056= A.I.R. 1925 Bom. 526.**

MOTOR VEHICLES ACT, (1914) S. 6—Liability.

——The accused was driving on a wrong side of the road at a sharp corner entering into a thoroughfare of considerable traffic with the result that he came into collusion with a motor bicycle, the side-car of which was damaged. It was due to the presence of mind of the person who was riding the motor bicycle that no further damage occurred.

Held, that an offence under Section 279, Penal Code, was committed. The offence of the accused was more serious than that contemplated by Section 5 of Act VIII of 1914. That section refers to a person who is driving a car in a manner which would in ordinary circumstances be proper, but owing to the special condition of the road at the time he is riding on it, is improper. (*Kennedy, J. C. and Madgavkar, A. J. C.*) YAR MOHOMAD *v.* EMPEROR. **84 I.C. 253=16 S.L.R. 147=26 Cr. L.J. 253= 7 A.I. Cr. R. 503= A.I.R. 1921 Sind 97.**

—S. 5 —License.

Where the accused had been driving cars regularly for about 13 years and had obtained a large number of good certificates from a variety of masters. and where he had never before had a conviction for bad driving.

Held: that the verdict that he was unfit to hold a license because he was not a good driver was ridiculous in view of his record and must be cancelled. (*Banerji, J.*) CHARAN SINGH *v.* EMPEROR. **88 I.C. 998=23 A.L.J. 790=26 Cr. L.J. 1254= 6 L.R.A. Cr- 150=A.I.R. 1925 All. 798.**

—Sch. 5—Summons.

——*Summons under the Act is to be in the form prescribed under S.* 68, *Criminal P. C.*

The procedure of issuing summonses by the Magisterial Courts purporting to charge motorists, owners or drivers of offences under the Act without giving the slightest particulars of the offence alleged is not justified by law. S. 68, Criminal P. C., incorporates the form of summons, which is a statutory form contained in Sch. 5 to the Code, which summons is to be issued to accused persons. (*Walsh and Banerji, JJ.*) EMPEROR *v.* RANJAI SINGH. **108 I.C. 230= 26 A.L.J. 331=9 A.I. Cr. R. 341=9 L.R.A. Cr. 49= 29 Cr. L.J. 357=A.I.R. 1928 All. 261.**

—S. 6—Liability.

——*Motor driven without owner's knowledge by an unlicensed driver—Owner is not liable—Nor is he liable even if his licensed driver had permitted the unlicensed driver to drive.*

Where a particuar intent or state of mind is not of the essence of an offence, a master can be made criminally liable for his servant's acts if an act is expressly prohibited, but not otherwise; and he cannot be so made liable if the act provides for liability for permitting and causing a certain thing unless it can be shown that the act was done with the master's knowledge and assent, express or implied.

Where a motor bus is driven by a person who has no license, without the knowledge of the owner, the owner cannot be convicted. Nor can he be convicted

MOTOR VEHICLES ACT, 1914, S. 6—License.

on the ground that his licensed driver had given the unlicensed driver permission to drive : A.I.R. 1924 Cal. 985, Rel. on: 38 Cal. 415 and 45 Cal. 430, Dist. (*Mukerji, J.*) INDRA MOHAN ROY *v.* EMPEROR.
110 I.C. 326=47 C.L.J. 460=10 A.I. Cr.R. 414=29 Cr. L.J. 694=A.I.R. 1928 Cal. 410.

—S. 6—License.

A motor-bus owner allowing his driver to drive his omnibus without a license cannot plead in defence that the expiry of the driver's license was not known to him. (*Jackson, J.*) CROWN PROSECUTOR *v.* KADIR MOHIDEEN. **105 I.C. 674=26 M.L.W. 568=1927 M.W.N. 852=28 Cr. L.J. 962=A.I.R. 1927 Mad. 1080=53 M.L.J. 757.**

—S. 7—'To ply for hire.'

———*Expression* "to ply for hire" *means to exhibit vehicle so as to invite public to travel in it.*

The expression "*to ply for hire*" ordinarily means to exhibit a vehicle in such a way as to invite those who may desire to do so to hire it or to travel in it on payment of the usual fares, and also to offer its use on payment to any member of the public, thereby soliciting custom. The owner of a bus driving it on a private errand cannot therefore be said to have been using it as a motor vehicle plying for hire : A.I.R. 1928 Mad. 166 and A.I.R. 1929 Lah. 422, Rel. on. (*Mirza and Broomfield, JJ.*) GANESH RAMCHANDRA *v.* EMPEROR. **32 Bom.L.R. 337=A.I.R.1930 Bom.161.**

—S. 8—Applicability.

Sections 8 and 9 do not apply to permits under R. 24, United Provinces Motor Vehicles Rules of 1924, but to the driving license prescribed by S. 6 of the Act and Rr. 20-22. Consequently failure of a driver of a public motor vehicle to produce on demand a permit issued to him under R. 24 is not an offence. (*Dalal, J.*) HASAN AHMAD *v.* EMPEROR. **111 I.C. 127=50 All. 876=10 A.I. Cr.R. 334=9 L.R.A.Cr. 124=29 Cr.L.J. 799=26 A.L.J. 1381=A.I.R. 1928 All. 492.**

—S. 8—Driver.

No person is a driver within the meaning of S. 8 unless driving. Further, it is only a Police Officer who can demand the license, and an order requiring the driver to attend a Magistrate's house or Court with his license is illegal. (*Ashworth, J.*) EMPEROR *v.* SITARAM. **101 I.C. 668=49 All. 754=25 A.L.J. 574=8 L.R. A.Cr. 69=7 A.I.Cr. R. 443=28 Cr.L J. 492=A.I.R. 1927 All. 478.**

—S. 8—License.

———*Right to demand license not restricted to a public place.*

Section 8 does not contemplate that police officer cannot ask a driver of a motor vehicle for his license in the private grounds of a private person and that he can only do so when a car is actually being driven by the person, whose license is demanded, whilst on the public road. (*Bucknill, J.*) AKLU *v.* EMPEROR. **97 I.C. 48=7 A.I.Cr.R. 164=7 P.L.T. 542=27 Cr.L.J. 1072=A.I.R. 1926 Pat. 446.**

———Non-production of license when demanded by police is a trivial and technical offence under S. 8 of the Act. There is no prohibition against the driving of a car by a properly licensed person who has not got his license with him and it is no offence to do so. The order of suspension under S. 18 (2) along with the fine, if any is a part of the sentence and is appealable. (*Hallifax, A.J.C.*). WHEKLIA KUNBI *v.* EMPEROR. **65 I.C. 425=23 Cr. L.J. 73=A.I.R. 1922 Nag. 71.**

MOTOR VEHICLES ACT, (1914) S.—16—Applicability.

———*Driver must carry licence always with him.*

It is compulsory upon a driver of a motor vehicle to carry his licence with him ; he is bound to produce it at once, directly a police constable calls upon him to do so, and failure to produce immediately upon such demand is punishable under the Act. (*Tudball, J.*) EMPEROR *v.* MADAN MOHAN. **43 All. 123=A.I.R. 1921 All. 277.**

—S. 10—Certificate.

———*Bombay Motor Vehicles Rules of* 1915 *as amended by Rules of* 1918—*Rule* 6 (1) (*B*) *and Schedule D*—Ultra vires—*Fixing of time limit of the certificate* is ultra vires.

It is *ultra vires* of the local Government to fix a time limit in the registration certificate and to make a corresponding change in the Schedule D as no power was given by S. 11 of the India Motor Vehicles Act to make rules for that purpose. Rule 6 of the Bombay Motor Vehicle Rules as amended is invalid and inoperative. (*Macleod, C. J. and Shah, J.*) J. D. SHERSTON *v.* EMPEROR. **65 I.C. 633=46 Bom. 646=24 Bom. L.R. 50=23 Cr. L.J. 169=A.I.R. 1922 Bom. 42.**

—S. 11—Accident.

———*Madras Rules under—R.* 27 (*c*) *providing for report of accidents to police is not* ultra vires—" *Accident* " *meaning.*

Rule 27 (c) which provides that the driver of the motor vehicle shall promptly report all occurrences of accidents to the nearest police station is intended to apply only to accidents happening to the car which one is driving and which results in some injury, annoyance or danger to the public or of danger or injury to public property or obstruction to traffic and so understood it is not *ultra vires.*

The petitioner was driving his car when on the way the car went out of control and jumped over a culvert, the parapet of which was only nine inches high, and fell into a channel. As a result of the accident, the front axle of the car was bent and some chunam was knocked off on the eastern side of the culvert. Those who were in the car received slight injures ; but they were able to return to their homes in the same car :

Held : that the incident is not an accident within the meaning of the rule.

Reilly, J.—An accident which makes the control of the vehicle impossible in the usual way or more difficult than usual, may be a source of danger to other users of the road and a rule requiring the driver to report such an accident would be within the rule-making power under the Act. (*Madhavan Nair and Reilly, JJ.*) NAGARAJA MOOPPANAR *v.* EMPEROR. **108 I.C. 909=29 Cr. L.J. 461=51 Mad. 504=1 M. Cr. C. 119=27 M.L.W. 425=9 A.I. Cr. R. 419=A.I.R. 1928 Mad. 364=55 M.L.J. 320.**

—S. 11—Rules under Scope.

———*U. P. Government Rules, R.* 22.

Rule 22 applies only to a person licensed to drive in another province and not licensed in the United Provinces. ((*Ashworth, J*) EMPEROR *v.* SITA RAM. **101 I.C 668=49 All. 754=25 A.L.J. 574=8 L.R.A. 69=7 A.I.Cr. 443=28 Cr. L.J. 492=A.I. R. 1927 All. 478.**

—S. 16—Applicability.

———*U.P. Motor Vechicles Rules, R.* 11—*R.* 11 *is not applicable to cars registered outside United Provinces.*

There is nothing in the wordings of these rules to show that R. 11 applies to cars registered outside the

MOTOR VEHICLES ACT, (1914), S. 16—Conviction.

United Provinces. It is clear from the definition of "Registering Authority" in R. 3 that this expression, as used in R. 11, means the authority who had registered the car under the rules in force in the United Provinces. Where therefore the applicant's car is not registered in the United Provinces, but brought there for a short period, R. 11 has no application to his case. (*Sen, J.*) P.C. CHAUDHRI *v.* EMPEROR. **120 I.C. 272=1930 Cr. C. 50=31 Cr. L.J. 40=1930 A.L.J. 527=A.I.R. 1930 All. 34.**

—S. 16—Conviction.

The fact that an unlicensed person was charged with driving a motor car without a license and pleaded guilty to that charge is not sufficient to justify a Court in convicting the motor driver of having allowed him to drive, where he was not specifically charged with that offence under Motor Vehicles Act, S. 16. (*Barlee, J.C.*) MAHOMED JAMAL *v.* EMPEROR. **119 I.C. 536=30 Cr. L.J. 1077=A.I.R. 1930 Sind 64.**

—S. 16—Defect.

Omission in a summons to specify the sections of the Motor Vehicles Act, or rules made thereunder for breach of which a person was being prosecuted is a serious defect; A.I.R. 1928 All. 261, Rel. on. (*Dalal, J.*) HASAN AHMAD *v.* EMPEROR. **111 I.C. 127=50 All. 876=10 A.I Cr. R. 334=9 L.R. A.Cr. 124=26 A.L.J. 1381=29 Cr. L.J. 799=A.I.R. 1923 All. 492.**

—S. 18—Exemption from.

There is no authority for the proposition that a motor-car which carries mails, and also carries passengers, is exempt from the operation of the ordinary rules about license for drivers and those restricting the number of passengers to be carried under the permit: (1890) Rat. Unrep. Cr. C. 512, Dist. (*Patkar and Baker, JJ.*) AHA APPA DHARAWADE *v.* EMPEROR. **100 I.C. 1053=29 Bom. L.R. 191=28 Cr. L.J. 397=A.I.R. 1927 Bom. 154.**

—S. 16—Interpretation.

Oudh Government Rules—R. 79—The word "ply" in the permit form F must be read to mean "ply for hire." (*Stuart, C.J.*) EMPEROR *v.* MOHOMMAD HANIF. **7 O.W.N. 464=A.I.R. 1930 Oudh 251.**

—S. 16—Liability.

——*Punjab Motor Vehicles Plying for Hire Rules* (1922), *S. 3—Owner is guilty of offence even though not present in case of breach of road certificate.*

Where the driver of a motor lorry does not use the lorry in conformity with the conditions specified in the road certificate, the owner of the lorry is guilty of an offence under S. 16, Motor Vehicles Act read with R. 3, Punjab Motor Vehicles Plying for Hire Rules, 1922, even though he is not present when the breach of the condition takes place.

Where, therefore, a driver was found carrying 17 (when only ten could be carried under the road certificate) and one passenger was sitting on mudguard, which was prohibited,

Held; that there being clear breach of the road certificate, the owner was liable under R. 3, Punjab Motor Vehicles Plying for Hire Rules, 1922, although he was not present: 38 Cal. 415; 45 Cal. 430 and A. I. R. 1924 Cal. 985, Rel. on; 27 P. R. 1918; A.I.R. 1928 Cal. 410 and A. I. R. 1924 Rang. 63, Dist. (*Addison, J.*) DEVI DAYAL *v.* EMPEROR. **A.I.R. 1930 Lah. 865.**

——*Patna Motor Vehicles Rules—R. 12—Person responsible for fixing board is the owner,*

The person responsible for having a board fixed upon the vehicle under R. 12 is owner and not the person who, from time to time, may have the use of the car.

Where a car is purchased by an estate for the use of its manager the manager cannot be said to be the owner under R. 12. (*Bucknill, J.*) AKLU *v.* EMPEROR. **97 I.C. 48=7 P.L.T. 542=27 Cr. L. J. 1072=7 A. I. Cr. R. 154=A.I.R. 1926 Pat. 446.**

MOTOR VEHICLES ACT, (1914), S. 16—Trial under.

——*Calcutta Rules 3 and 16.*

Absent master is not criminally liable for fast driving where he had cautioned the driver not to exceed the regulation speed and to drive with due care and caution. (*Greaves and Duval, JJ.*) VARAJ LALL *v.* EMPEROR. **82 I. C. 137=51 Cal. 948=28 C.W.N. 854=25 Cr. L.J. 1209=A.I.R. 1924 Cal. 985.**

——*Burma Motor Vehicles Rules* 1915, R. 26 (3).

Owner of a Motor car is not criminally liable for negligence of the driver in driving the car without properly illuminated rear light, if the owner has made provision for such illumination. 36 C. 415 and 45 C. 430, Dist. (*May Oung, J.*) MAHOMED SURTY *v.* KING EMPEROR. **76 I.C. 564=1 Rang. 600=2 Bur. L.J. 201=25 Cr. L.J. 196=A.I.R. 1924 Rang. 63.**

—S. 16—License.

——*Calcutta Motor Vehicle Rules, R. 28—Construction.*

Conditions of the permit apply to the licensed vehicles for the period of the license irrespective of whether it was in use at the time as a carriage standing or plying for hire or the use was gratuitous: *Hawkins* v. *Edwards*, 2 K.B. 169, Ref. (*Courtney Terrell, C. J., and Dhavle, J.*) EMPEROR *v.* RAM TAHAL SINGH. **9 Pat. 169=1929 Cr. C. 282=A.I.R. 1929 Pat. 522.**

—S 16—Offence under.

There is no such thing as an offence under S. 16, Motor Act, at all and, in the second place, there is no offence in the Motor Vehicles Act of failing to give notice to the police that the accused driver has killed a boy. S. 16 is a penalty clause and prescribes the penalties which may be inflicted upon anybody who contravenes any of the provisions of the Act or any rule made under the Act. (*Walsh and Banerji, JJ.*) EMPEROR *v.* RANANJAI SINGH. **108 I.C. 230=26 A.L.J. 331=9 A.I. Cr.R. 341=9 L.R.A. Cr. 49=29 Cr. L.J. 357=A.I.R. 1928 All. 261.**

—S. 16—R. 41—Overloading.

Suspension of a permit for an offence of overloading a motor cannot be permitted. (*Wort, J.*) SHEODATT ROY *v.* EMPEROR. **110 I.C. 803=29 Cr. L.J. 771=11 A.I. Cr.R. 43=10 P.L.T. 429=A.I.R. 1929 Pat. 64.**

—S. 16—Proof.

(Patna) Motor Vehicles Rules, R. 13—Time at which car was found driven without proper lights must be accurately proved. (*Bucknill, J.*) AKLU *v.* EMPEROR. **97 I. C. 48=7 P. L. T. 542=27 Cr. L. J. 1072=7 A.I. Cr. R. 154=A. I. R. 1926 Pat. 446.**

—S. 16—Rules under—R. 19—Tax.

Municipalities outside Calcutta cannot tax motor vehicles plying for hire. (*Newbould and B. B. Ghose, JJ.*) SUDHAMONY DAS *v.* CHAIRMAN, KRISHNAGAR MUNICIPALITY. **88 I. C. 1045=41 C. L. J. 566=26 Cr. L. J. 1269=7 A. I. Cr. R. 502=A. I. R. 1925 Cal. 1026.**

—S. 16—Trial under.

S. 403, Cr. P. Code bars the trial of the accused

MURSHIDABAD ACT, (1891)—Lease.

for an offence under S. 16 of the Motor Vehicles Act, so long as the acquittal of the accused under S. 338, I. P. Code on the same facts remains in force. (45 Cal. 727, Foll.). Applicability of S. 403 does not depend upon additional evidence being available or not. (*Jwala Prasad, J.*) MAKSUDAN MISTRY *v.* KING EMPEROR. **59 I. C. 207=2 P. L. T. 31=22 Cr. L.J. 63=1921 P. H. C. C. 108=A. I. R. 1921 Pat. 22.**

MOVEABLE PROPERTY.

See PENAL CODE.

MUAFI.

See (1) GRANT.
(2) LANDLORD AND TENANT.

MUKHTEAR.

See LEGAL PRACTITIONER.

MULGENI LEASE.

See (1) LAND TENURE.
(2) LEASE.

MULTIFARIOUSNESS.

See C. P. CODE S. 99 AND O. 1, R. 3.

MUNICIPALITY.

See LOCAL ACTS.

MURDER.

See PENAL CODE, SS. 299—304-A.

MURSHIDABAD ACT, (25 OF 1891).

—Lease.

———*Condition* (1)—*Lease in contravention—Effect.*

The Nawab of Murshidabad executed a lease to the defendants of certain lands and premises to which the Murshidabad Act 15 applied for a term of 21 years in consideration of the sum of rupees five lacs as advance of the total rent payable for during the said term of 21 years. The Nawab then sued to recover possession of the demised property and mesne profits, upon the ground that the lease was null and void by reason of the provisions of condition (1) of the Murshidabad Act.

Held : that the lease contravened condition (1) of the Act and was therefore null and void.

Held further : that as the Nawab was a person under disability, he was not estopped from denying the validity of the lease : *Jeffries* v. *Alexander*, 8 H. L. C. 594 ; *Batiman* (*Lady*) v. *Faber*, (1898) 1 Ch. 144; *Leslie v. Sheill*, (1914) 3 K.B. 607 ; 36 Cal. 920 ; A.I.R. 1928 Cal. 537 and other cases discussed. (*Page, J.*) NAWAB OF MURSHIDABAD *v.* BILAS ROY. **118 I.C. 561=56 Cal. 252=A.I.R. 1929 Cal. 433.**

—Receiver.

———*Act* 15 *is no bar to appointment of receiver in execution of decrees of rent and profits.*

A Bank was unsecured creditor of Nawab of Murshidabad for a debt represented by four decrees. The debt was adjusted and it was agreed that Bank was to realize by execution the money that would be outstanding. The Bank applied for an order that a receiver should be appointed in execution of the decrees of the rents and profits of certain properties all of which were within the ordinary original civil jurisdiction of civil Court. It was contended that having regard to the Murshidabad Act the rents and profits could not be taken in execution by means of receiver,

Held : that there was nothing in the Act which would prevent the Nawab from borrowing a sum of money and giving an assignment of the next months' rent of a certain house by way of consideration. The appointment of a receiver was a discretionary remedy and it was the only reasonable remedy in the particular case : *Davis* v. *Duke of Marlborough*, (1818) 1 Swan 74; A. I. R. 1925 P. C. 176, Dist. (*Rankin, C. J. and C. C. Ghose, J.*) KARNANI INDUSTRIAL BANK LTD. *v.* NAWAB BAHADUR OF MURSHIDABAD. **50 C.L.J. 403=A.I.R. 1930 Cal. 159.**

MUSEUM ACT (10 of 1910.)

—S. 13—Tenure of Service.

———*S.* 13 *has no reference to tenure of service.*

Section 13 is quite definite as to the matters with which it purports to deal, and all that it provides is that so far as regards their "salary" "allowances" and "pension" and their leave of absence from duty, they (*i.e.* officers and servants appointed under the Act) shall be subject to the rules which under the Civil Service Regulations for the time being in force would be applicable, if their service was service under the Government. That section has no reference at all to the question of the tenure of office. (*Costello, J.*) BIMALCHARAN *v.* TRUSTEES, INDIAN MUSEUM. **57 Cal. 231=A.I.R. 1930 Cal. 404.**

———The tenure of employment of a person appointed by the trustees of a museum under Museums Act, is of such a kind that, in the absence of any regulations or conditions prescribed by the trustees under S. 9 of the Act, it can be terminated by reasonable notice. (*Costello, J.*) BIMALCHARAN *v.* TRUSTEES, INDIAN MUSEUM. **57 Cal. 231=A.I.R. 1930 Cal. 404.**

MUSHAA.

See MAHOMEDAN LAW—GIFT.

MUSSALMAN WAKF ACT, (XLII of 1923).

—Accounts.

The sections of the Act as they stand do not confer any authority on the Court to pass an order that a mutwali should file a statement of accounts. The only procedure provided is to punish him for not filing it. (*Sulaiman and Niamatullah, JJ.*) NASRULLAH KHAN *v.* WAJID ALI. **118 I.C. 717=1930 A.L.J. 233=52 All. 167=A.I.R. 1930 All. 81.**

—Applicability.

Where a substantial portion of the profits of the endowed property is earmarked for the support and maintenance of certain specified individuals who are also the relations of the settlor and the remaining portion for public of Shia community, the wakf is not wholly for public purposes and the Acts 14 of 1920 and 42 of 1923 are not applicable to it : A.I.R. 1929 Oudh 225 (F.B.), Rel. on. (*Wazir Hasan and Misra, JJ.*) MOHAMMAD ABID *v.* JAFAR HUSAIN. **119 I.C. 365=A.I.R. 1930 Oudh 53.**

———A trust covered by the provisions of the Charitable and Religious Trusts Act of 1920, is not to be so wide in its purpose as a wakf under the Mussalman Wakf Act of 1923. The Act of 1923 deals with a trust by a person professing the Mussalman faith whatever its purpose, public or private or partly public and partly private. On the other hand, the Act of 1920 covers such trusts only as are created or exist for a public purpose only. (*Wazir Hasan, Ag. C. J., Misra and Raza, JJ.*) SHABBIR HUSAIN *v.* ASHIQ HUSAIN. **117 I.C. 739=6 O.W.N. 316=4 Luck. 429=A.I.R. 1929 Oudh 225 (F.B).**

—Wakf.

———*Definition of wakf.*

Per *Raza, J.*—"Wakf" as defined in the Mussalman Wakf Act of 1923, includes wakfs of all kinds except such wakf as is described in S. 3, Mussalman Wakf Validating Act of 1913, under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any of his family or descendants. (*Wazir Hasan, Ag. C. J., Misra and Raza, JJ.*) SHABBIR HUSAIN *v.* ASHIQ HUSAIN. **117 I.C. 739=6 O.W.N. 316=4 Luck. 429=A.I.R. 1929 Oudh 225 (F.B.)**

MUSSALMAN WAKF ACT, (1923)—Wakf.

———*Act does not authorise investigation into question of title—It applies to admitted waqfs.*

There is no provision in the Act authorizing the Court as defined in the Act to determine as to whether any property which is denied to be a wakf property is a wakf property within the meaning of the Act.

The Legislature never intended to authorize the Court to decide the question of title under the provisions of Act 42 of 1923. This Act applies to admitted wakfs and not to properties which are denied to be wakf properties. If a mutwali in charge of wakf properties denies the properties to be wakf properties, ample provision is made in other enactments for the preservation of the wakfs and for removal of such mutwallis. (*Kulwant Sahay, J.*) (SYED) ALI MOHAMMAD *v.* COLLECTOR OF BHAGALPUR. **101 I.C. 207 = 8 P.L.T. 233 = A.I.R. 1927 Pat. 189.**

—S. 2—Applicability.

The Mussalman Wakf Act 1923, applies to such Wakfs as are defined in S. 2 (e) of that Act and does not apply to such other wakfs as are expressly excluded from the operation of the definition. The exception covers a wakf such as is described in S. 3 of the Mussalman Wakf and Validating Act (1913) under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any of his family or descendants.

Where a testator by his will bequeathes the whole of his property owned and possessed by him on the date of the will and also property which he may acquire thereafter in favour of his two sons in equal shares, but no list of the property on which the bequest was to operate was attached to the will, and where the testator further states that there is some wakf property which is attached to the Imambara and of which he was a Mutwalli and he prescribes a scheme of succession in the Office of the Mutwalli and the duties of the Mutwalli in Office, but the recitals in the will neither fix with any definiteness the property which is the subject-matter of the wakf nor do they in any way indicate the terms or the nature of the wakf, and where no evidence of any dedication of property or of any purpose of wakf is found,

Held : that there was no evidence to justify the treatment of any property as wakf property within meaning of that term as defined in the Mussalman Wakf Act, 1923. (*Hassan, C. J. and Pullan, J.*) ALI IMDAD *v.* WAKF PROPERTIES OF PARSHADEPUR. **7 O.W.N. 980.**

—S. 4—Trust.

Where a trust is of a public nature any person having an interest in the said trust is entitled to make the application contemplated by S. 3, Charitable and Religious Trusts Act of 1920, but he is not so entitled if the purpose of the trust created by a Mahomedan is partly public and partly private. In the latter case his remedy lies to make an application under S. 4 of the Act of 1923. (*Wazir Hasan, Ag. C. J. Misra and Raza, JJ.*) SHABBIR HUSAIN *v.* ASHIQ HUSAIN. **117 I.C. 739 = 6 O.W.N. 316 = 4 Luck. 429 = A.I.R. 1929 Oudh 225 (F.B.)**

—S. 10—Offence under.

There does not appear to be anything in the Mussalman Wakf Act which is repugnant to the definition of an offence contained in the General Clauses Act and in the Criminal Procedure Code and as the Act contains no provision regarding the Court by which offences under S. 10 of the Act should be tried, they can be tried by any Magistrate. (*Percival, J. C., and Aston, A. J. C.*) ALI MOHOMED *v.* EMPEROR. **106 I.C. 666 = 22 S.L.R. 141 = 9 A.I.Cr.R. 142 = 28 Cr.L.J. 954 = A.I.R. 1928 Sind 43.**

MUSSALMAN WAKF VALIDATING ACT, (1913)—Scope.

MUSSALMAN WAKF VALIDATING ACT (6 of 1913.)

—Creation of Wakf

———*Hanafi Mussalman can create a wakf for his own maintenance during his life provided ultimate benefit is reserved for charitable purpose.*

It is lawful for a Hanafi Mussalman to create a wakf for his own maintenance during his lifetime provided that the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

At the time of making the wakf the wakif had taken upon himself the responsibility of constructing a mosque of some value, of equipping that mosque, and of providing for the needs of the worshippers and retained the income of the property for himself for life. Further, he proposed to retain the dedicated property in his own management and to spend the income for the maintenance of himself, his wife and children and on religious and charitable purposes. He was himself to remain its mutwalli, mutasarrif and administrator. The income was to remain in his sole charge for these purposes during his lifetime. After his death, his wife and her son were to obtain benefit from the income of the property if they survived him. He further laid down directions as to who should be mutwalli after his death. Certain payments were to be made for specified religious purposes.

Held : that the ultimate benefit of this wakf was clearly reserved for the poor and for religious and charitable purposes recognized by the Hanafi law and the wakf was valid. (*Stuart, C. J., and Raza, J.*) MT. BISMILLA BEGAM *v.* MOHAMMAD ALI MOHAMMAD. **102 I.C. 77 = 4 O.W.N. 360 = A.I.R. 1927 Oudh 162.**

—Object.

The true intention and object of the legislature in passing the Act was merely to do away with the effects of the decisions which said that the bequests for charity should not be illusory or unsubstantial. (*Srinivasa Aiyangar, J.*) MD. BI BI *v.* SULAIMAN. **98 I.C. 838 = 24 M.L.W. 425 = A.I.R. 1926 Mad. 1110.**

—Scope.

———*Policy of the Act—Ultimate gift for charity.*

Per Sen, J.—The Wakf Validating Act does not provide that there should be a substantial concurrent gift to meritorious objects or that there should be a concurrent gift to such objects at all. The policy of the Act is amply vindicated, if there is an ultimate gift in favour of such objects as are considered pious, religious, charitable or meritorious under the Mahomedan law or religion, and the paltriness of the income set apart for charity etc. is immaterial. (*Sen and Niamatulla, JJ.*) IRFAN ALI *v.* BHAGWANT KISHORE. **112 I.C. 623 = A.I.R. 1929 All. 180.**

—The Act has no retrospective effect and cannot be construed as validating deeds executed before its date : A.I.R. 1922 P.C. 107, Rel. on. (*Rupchand, A. J. C.*) MAHOMEDALLY EBRAHIMJI *v.* LAKHMICHAND ISSARDAS. **111 I.C. 882 = 23 S.L.R. 207 = A.I R. 1929 Sind 52.**

———*Act is not retrospective—For validity of waqfs prior to the Act there must be substantial dedication to charitable purposes—Settlor may provide for himself and his dependents for their lives —Provisions of the deed must be looked to rather than the language.*

The Mussalman Waqf Validating Act has no retrospective operation. Under the Act a waqf is not rendered invalid because it appears that the main object

MUSSALMAN WAKF VALIDATING ACT, (1913) —Scope.

of the settlor was to make a settlement of the property on his family rather than to devote it to what are ordinarily understood as charitable purposes whereas with regard to waqfs created before the passing of the Act the test still is 'Was there a substantial dedication of the property to charitable purposes.' The test may sometimes be difficult of application and in applying it the Courts, especially since the passing of the Act, will not be disposed to construe the provisions of the deed too strictly, but the question must remain whether the properties have been substantially dedicated to charity or whether they have been put into waqf by the settlor with the real object of effecting some non-charitable purpose, for instance, that of making a family settlement of his property which would otherwise be invalid as opposed to the Mahomedan law of succession. The settlor may make provision for the maintenance of himself and of those who are dependent on him for the terms of their lives. Such provisions would in no way be inconsistent with a substantial dedication to charity. On the other hand, if it should appear that the bulk of the income was settled on the line of the descendants and need only to be given to charity on failure of such line an event which might be indefinitely postponed then the fair inference might be that his object was to make a settlement on his family which would not otherwise have been possible and that property settled on such terms should not be properly said to be substantially dedicated to charity.

In considering this question regard must be had to the provisions themselves rather than to the language in which they are expressed. Because even where the intention is not to make a substantial dedication to charity, the object of the draftsman would be to make it appear as far as possible that it was so.

It must be noted that the properties must be substantially dedicated to charity and not that the gift to charity should be substantial : A.I.R. 1922 P.C. 107 ; A.I.R. 1916 P.C. 86 ; 17 Cal. 498 (P.C.) and 23 All. 233 (P.C.) Ref. (*Sir John Wallis.*) BALLA MAL *v.* ATA ULLAH KHAN. **103 I.C. 518=54 I.A. 372= 1927 M.W.N. 581=4 O.W.N. 705= 29 Bom. L.R. 1289=46 C.LJ. 188= 31 C.W.N. 1092=26 A.L.J. 22= 26 M.L.W. 710=8 P.L.T. 699=29 P.L.R. 1= A.I.R. 1927 P.C. 191=53 M.L.J. 166 (P.C.).**

——*Act is prospective.*

The Mussalman Wakf Validating Act of 1913 is not a retrospective but only a prospective Act. (*Mirza, J.*) AZIMUNNISSA BEGUM *v.* SIRDAR ALI. **102 I.C. 129=29 Bom.L.R. 434= A.I.R. 1927 Bom. 387.**

——The Act is not retrospective. (*Marten, J.*) ADVOCATE-GENERAL, BOMBAY *v.* YUSUF ALI EBRAHIM. **84 I.C. 759=24 Bom. L.R. 1060= A.I.R. 1921 Bom. 338.**

—S. 2—Definition.

——*Definition of 'Waqf' is given for the purposes of the Act.*

The definition of waqf is given for the purposes of the Act. The Act does not purport to deal with the validity or otherwise of waqfs for objects which are indefinite and uncertain but declares that certain waqfs for the maintenance and support of the waqif, his family and descendants, shall, under certain circumstances, be treated as valid. (*Rupchand, A.J.C.*) MAHOMEDALLY EBRAHIMJI *v.* LAKHMICHAND ISSARDAS. **111 I.C. 882=33 S.L.R. 207= A.I.R. 1929 Sind 52.**

——The definition of "waqf" as given in the Act is not necessarily exhaustive. (*Sir John Wallis.*) MA MI *v.* KALLANDER AMMAL. **100 I.C. 32= 5 Rang. 7=54 I.A. 23=25 A.L.J. 69= 1927 M.W.N. 76=38 M.L.T. 53= 4 O.W.N. 300=29 Bom. L.R. .772=45 C.L.J. 268= 31 C.W.N. 625=25 M.L.W. 679=6 Bur. L.J. 59= A.I.R. 1927 P.C. 22=52 M.L.J. 362 (P.C.).**

—S. 2—Document described as waqf.

——*Ultimate object being accumulation of property—Public not given any right—Validity of dedication.*

Where a Mahomedan executed a deed of wakf under which he directed that two-thirds of the income of certain properties should after his lifetime be given to his relations and that the balance should after payment of revenue and expenses of repair, etc., be utilised "on good acts", such as fatiha, education, marriage, etc., and it was further directed that the money that may remain unspent in any event should be accumulated and the trustees were prohibited from transferring the property and it was declared that the public were to have nc right in the properties dedicated, *held*, that the dedication was not valid under the Mussalman Wakf Validating Act because the ultimate object of the wakf was mere accumulation of property. (*Mukerji and Bennet, JJ.*) SAIYAD IRFAN ALI *v.* OFFICIAL RECEIVER, AGRA. **1930 A. L. J. 978.**

—S. 3—Bequest.

It cannot have been the intention of the legislature that by the use merely of the word "waqf" in a deed, a bequest for the poor or any other purpose such as is indicated in the proviso could be inferred. (*Srinivasa Aiyangar, J.*) MD. BI BI *v.* SULAIMAN. **98 I.C. 838=24 M.L.W. 425=A.I.R. 1926 Mad. 1110.**

—S. 3—Descendant—

——*Descendant means male and female descendants.*

The word "descendants" in S. 3 (A) indicates persons descended from the settlor both in the male and the female line and so descendants in the female line not residing in the house of the settlor and not maintained by him are within the Act and cannot be excluded from its purview. (*Sen and Niamatullah, JJ.*) GHAZANFAR HUSAIN *v.* MT. AHMADI BIBI. **123 I.C. 369=1930 A.L.J. 109=A.I.R. 1930 All. 169.**

—S. 3-A—Family.

Word "family" in the sub-S. 3 (A) includes only those persons residing in his house for whose maintenance the author of the trust is mainly responsible and indicates persons descended from one common progenitor and having a common lineage : A. I. R. 1925 Oudh, 301, Diss. from. (*Senand Niamatullah, JJ.*) GHAZANFAR HUSAIN *v.* MT. AHMADI BIBI. **123 I.C. 369=1930 A.L.J. 109= A.I.R. 1930 All. 169.**

——A daughter-in-law living in the same house as the settlor and maintained by him is undoubtedly a member of the family of the settlor. (*Sen and Niamatullah, JJ.*) GHAZANFAR HUSAIN *v.* MT. AHMADI BIBI. **123 I.C. 369=1930 A.L.J. 109= A.I.R. 1930 All. 169.**

——*Deceased brother's wife and children are included in the word "family."* (*Agha Haidar, J.*)

A executed a wakfnama in which he made provision out of his property for the maintenance of his deceased brother's wife and another deceased brother's children. The provision was challenged as invalid as being in contravention of S. 3-A of the Act.

Held : (*Per Agha Haidar, J.*) that the deceased brother's son comes within the meaning of the word

MUSSALMAN WAKF VALIDATING ACT, (1313)

—S.-3 A—Family.

"family," as used in S. 3-A of the Act. The meaning of the words used by the wakif should be interpreted according to their Urf and that the real and lexical meanings of words should be understood in a sense which would not be contrary to their Urfi meaning. The conceptiou of Urf may differ in various countries and perhaps in different communities, but there cannot be any doubt that, according to the Urfi language, the word "family" among Indian Muslims would include the widow of a deceased brother: A. I. R. 1929 Oudh 25 and A.I.R. 1928 All. 516, Ref. (*Tekchand and Agha Haider, JJ.*) RASHID.UD-DIN *v.* NAZIRUD DIN. **11 L.L.J. 404=A.I.R. 1929 Lah. 721.**

—*Family is not restricted to members living with and dependant on wakif.*

The word "family" should not be restricted to include only persons residing in the house of and dependent for maintenance on the wakif. The son of wakif's half-brother, the son of wakif's father's brother, the grandson of wakif's father's brother and wakif's half-sister are all members of the wakif's family within the meaning of this section even though they live separate from the wakif: 22 Cal. 619 (P.C.) and A.I.R. 1925 Oudh 301, Diss. from. (*Stuart, C. J. and Raza, J.*) IMDAD ALI *v.* ASHIQ ALI.

113 I.C. 424=5 O.W.N. 980=4 Luck. 101=A.I.R. 1929 Oudh. 25.

———The word "family" has been used in the decisions of their Lordships of the Privy Council in 22 I.A. 76 and others and in the Wakf Validating Act in its broad popular sense so as to include all relatives more or less dependent on the settlor and a daughter-in-law living with an Indian house-holder is undoubtedly a member of his family in that sense. (*Kendall and Niamatullah, JJ.*) MT. MUSHARRAF *v.* MT. SIKANDAR JEHAN BEGAM. **111 I.C. 583=51 All. 40=26 A.L.J. 1180=A.I.R. 1928 All. 516.**

———*"Family" includes only those for whose maintenance the settlor is responsible—No ultimate reservation for poor—Wakf fails.*

The correct meaning of the word "family" in the sub-S. (a) is that it includes only those persons residing in his house for whose maintenance the author of the trust is mainly responsible.

Where a wakf deed appropriated the usufruct of the property to the author's own maintenance and to that of certain others who were the distant collateral relations of the author and their heirs after them the author himself being of advanced age and childless and to certain separate religious and charitable objects:

Held: that the wakf failed so far as it disposed of the usufruct of the property in favour of the settlor and others, because the distant collaterals could not come within the term "family" in S. 3 (a) and because there was no ultimate reservation of any benefit to the poor, such ultimate reservation of benefit to the poor being essential for the validity of a wakf. (*Dalal and Cuming, A. J. Cs.*) ABDUL MABUD KHAN *v.* NAWAZISH ALI KHAN. **84 I.C. 152=A.I.R. 1925 Oudh. 301.**

—S. 3—'Family', children, or descendants—Meaning of.

———*Some members of a class—Gift in favour of—Validity.*

A *wakf* may be validly created in favour of certain members of the family to the exclusion of others. Considerations of expedieney cannot prevail with the Court to introduce words into a section which are not there. The section provides for only two conditions to the validity of a *wakf*: (*i*) it should conform to the Muhammadan Law; (*ii*) the ultimate benefit of the

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wakf should be reserved for religious or charitable purposes. The ancient Mussalman Text-writers do not discountenance the idea of a settlement in favour of some only of a class, though it may be at variance with the principles of the law of inheritance. (*Percival, J. C. and Rupchand Bilaram, A. J. C.*) ABDUL NABI KARIMDINO *v.* MAZHARALI NUR MAHOMED. **125 I.C. 33.**

—S. 3—Interpretation.

The proviso to S. 3 covers both the clauses (a) and (b) of S. 3. (*Srinivasa Aiyangar, J.*) MD. BI BI *v.* SULAIMAN. **98 I.C. 838=24 M.L.W. 425=A.I.R. 1926 Mad. 1110.**

———The benefits to the poor or other purposes mentioned in the proviso are such purposes as are, apart from any usages of any sects of Mussalmans, generally in Mahomedan Law recognized as charitable purposes. (*Srinivasa Aiyangar, J.*). MD. BI BI *v.* SULAIMAN. **98 I.C. 838=24 M.L.W. 425=A.I.R. 1926 Mad. 1110.**

———The words "of a permanent character" in the proviso must be regarded as indicating only those general purposes which are called religious, pious, or charitable under all systems of Mahomedan Law. A gift for the maintenance of one's children, family or decendants cannot by any means be regarded as permanent. (*Srinivasa Aiyangar, J.*) MD. BI BI *v.* SULAIMAN. **98 I.C. 838=24 M.L.W. 425=A.I.R. 1926 Mad. 1110.**

—S. 3—Validity.

———*Intention of creator not to leave ultimate benefit to charity—Wakf is invalid.*

Where there is no provision for the ultimate benefit of the poor or for any purpose recognized by the Musalman Law as a religious, pious or charitable purpose of a permanent character, but the waqf only provides for the creator and his descendants, the waqf is invalid although one can imply such an intention to leave the ultimate benefit to charity, but the possibility of making any implication is destroyed, where the document shows definitely the intention of the creator to be otherwise. (*Mears, C. J. and Lindsay, J.*). WAHIDUDDIN *v.* MT. SHAMSUNNISSA BEGUM. **93 I.C. 14=A.I.R. 1926 All. 378.**

———Existence of morigage and provision for its discharge does not invalidate *wakf*. (*Mookerjee and Buckland, JJ.*) BIBI JINJIRA KHATUN *v.* MOHAMMAD FAKIRULLAH MIA. **67 I.C. 77=49 Cal. 477=26 C.W.N. 749=34 C.L.J. 444=A.I.R. 1922 Cal. 429.**

———*Ultimate benefit reserved for poor,* wakf *is valid.*

Where, although provision is made for the maintenance and support of the family, children and descendants of the settlor, the ultimate benefit is reserved for the poor and for other purposes recognised by the Mahomedan Law as religious, pious or charitable purpose of a permanent character and there is an immediate gift to charity of a substantial character, *held*: no valid objection can be taken to the legality of the *wakf*. (*Mukerjee and Buckland, JJ.*) BIBI JINJIRA KHATUN *v.* MOHAMMAD FAKIRULLAH MIA. **67 I.C. 77=49 Cal. 477=26 C.W.N. 749=34 C.L.J. 444=A.I.R. 1922 Cal. 429.**

MUTA.

See MAH. LAW—MARRIAGE.

MUTAWALLI.

See MAH. LAW—WAQF.

MUTT.

See HINDU LAW—RELIGIOUS ENDOWMENT.

MUTUAL ACCOUNTS.

See (1) ACCOUNTS.

MUTUAL ACCOUNTS.
(2) LIMITATION ACT.

NAGPUR JUDICIAL COMMISSIONER'S COURT RULES.

—R. 2. (b)—Valuation.

Hearing of first appeal by Bench of two Judges—Value of suject-matter of suit and of appeal must be Rs. 10,000 or upwards. (*Findlay, Offg. J. C. and Wadegaonkar, A. J. C.*) CHUNNI LAL *v.* KISHANDAS RAMDAS. **89 I. C. 407 = A. I. R. 1926 Nag. 71.**

NAIKINS.
See HINDU LAW—(1) ADOPTION.
(2) SUCCESSION.

NAMBUDRIS.
See MALABAR LAW.

NANKAR.
See LANDLORD and TENANT—CESS.

NATIVE CHRISTIAN ADMINISTRATION OF ESTATES ACT (7 OF 1901)

—S. 3—Karen Christians.

——Succession Act, S. 190 is not applicable to Karen Christians because they are Christians of Asiatic descent. (*Heald and Chari, JJ.*) MA NAN THU *v.* MA SHWE MI. **88 I. C. 609 = 4 Bur. L.J. 76 = A.I.R. 1925 Rang. 233.**

NATIVE CONVERTS' MARRIAGE DISSOLUTION ACT (21 OF 1866.)

—Conversion.

The conversion to Christianity of one spouse among Hindus does not dissolve the marriage. (*Schwabe, C. J. Oldfield and Ramesam, JJ.*) PAKKIAM SOLOMAN *v.* CHELLIAH PILLAY. **75 I.C. 17 = 46 Mad. 839 = 33 M.L.T. 231 = A.I.R. 1924 Mad. 18 = 45 M.L.J. 208 (F.B.).**

NATIVE PASSENGER SHIPS ACT (10 OF 1887.)

—S. 31—" Voyage."

——*Certificate 'A'—Voyage from Bombay to Goa and back is one voyage.*

The accused who plied a steamer between Bombay and Goa for Conveyance of passengers had certificate 'A' as required by Sections 9 and 10 of the Native Passenger Ships Act, 1887 which expired on the night of 31st May, 1921. The steamer left Bombay with passengers on the 31st May, 1921 for Goa and returned to Bombay on the 2nd June, 1921. The accused was charged under Section 31 with the offence of sailing a ship without a certificate :

Held : The accused had committed no offence, for the voyage from Bombay to Goa and back was really one voyage. (*Macleod, C. J. and Shah, J.*) T. S. MACHADO *v.* EMPEROR. **69 I.C. 91 = 46 Bom. 438 = 23 Cr. L.J. 651 = 23 Bom. L.R. 1200 = A.I.R. 1922 Bom. 167.**

NATTUKOTTAI CHETTIS.

—Bankers of South India.

It is a matter of general knowledge recognised in various decisions of the Madras High Court that Nattukkottai Chettis are really the Indian Bankers of this part of the country. (*Wallis, C.J. and Moore, J.*) THE OFFICIAL ASSIGNEE OF MADRAS *v.* RAMASWAMI CHETTY **59 I.C. 475 = 43 Mad.. 747 = 12 M.L.W. 89 = 1920 M.W.N. 424 = 39 M.L.J. 135.**

—Negotiable Instruments—Practice.

Among Nattukottai Chettis it is the practice that generally promissory notes are executed by agents on behalf of the firms without adding any qualifying words such as " for," " per pro " or " agent " to their signatures. (*Coutts-Trotter, C. J. and Ramesam, J.*) MAYA NADAN & BROS. *v.* ARUNACHALAM CHETTIAR. **97 I.C. 981 = 1926 M.W.N. 671 = A.I.R. 1926 Mad. 1106.**

NEGOTIABLE INSTRUMENTS—Conditional discharge.

—Rate of Interest.

The Madras rate of interest prevailing among Nattukkottai Chettis is 8½ per cent. (*Abdur Rahim, Offg. C.J. and Moore, J.*) VENKATACHELLAM CHETTY *v.* RAMANADAN CHETTY. **59 I.C. 501 = 12 M.L.W. 228 = 1921 M.W.N. 502 = 39 M.L.J. 269.**

NATURALIZATION ACT (1870, 33 & 34, Vict. Ch. 14).

—"Alien".

Raja of Faridkot is not an alien. (*Fforde and Jailal, JJ.*) MAHARAJA OF FARIDKOT *v.* ANANT RAM. **114 I.C. 62 = 10 Lah. 447 = A.I.R. 1929 Lah. 1.**

NATURAL RIGHTS.
See EASEMENTS ACT, S. 7.

NATURAL RIVERS.
See (1) CROWN.
(2) EASEMENTS ACT.
(3) RIPARIAN RIGHTS.

NAVIGABLE RIVER.
See (1) ALLUVION AND DILUVION.
(2) CROWN.
(3) EASEMENT.
(4) GRANT.
(5) RIPARIAN RIGHTS.

NECESSITY.
See HINDU LAW—ALIENATION—JOINT FAMILY.

NEGLIGENCE.
See (1) PENAL CODE, S. 304-A.
(2) TORT.

NEGOTIABLE INSTRUMENTS.
See also (1) C. P. CODE, O. 37,
(2) NEGOTIABLE INSTRUMENTS ACT.
(3) PROMISSORY NOTE.

——*Negotiable Instruments—Bills of Exchange—Scope.*

In spite of dishonour the drawer remains a surety. (*Raymond and Madgavkar, A.J.Cs.*) CHELANDAS MOHANDAS *v.* MESSRS. RALLI BROTHERS. **83 I.C. 135 = A.I.R. 1925 Sind 153.**

—Cheque.

——*Money cashed on forged cheque—Customer not to bear loss unless gross negligence is proved.*

Where all that was alleged against appellant the customers on the score of negligence was that they were negligent in the custody of their cheque book and their rubber stamps which were consequently used on their cheques.

Held : that it would not be sufficient to make appellants bear the loss which resulted from the forgery of a cheque stolen from their cheque book and the fraudulent use of their stamps, if the respondents Bankers cashed the forged cheque and have not been able to establish such negligence as would in law render appellants liable. In order to make the customer liable for the loss, the neglect on his part must be in, or intimately connected with, the transaction itself and must have been the proximate cause of the loss. (1909) 2 K. B. D. 1010, Foll. (1855) 5 H. L. C. 389, Foll. (*Heald and May Oung, JJ.*) AHMED MOOLA DAWOOD *v.* S. R. M. M. C. T. PEREINAN CHETTY FIRM. **80 I.C. 261 = 3 Bur. L.J. 22 = A.I.R. 1924 Rang. 264.**

—Conditional discharge.

A promissory note given for reducing a liability only operates as a conditional discharge for the liability (21 M.L.J. 432 ; 26 M. 526 referred to). (*Kumaraswami Sastri and Pakenham Walsh, JJ*). IMPERIAL BANK OF INDIA *v.* AVANASI CHETTIAR. **A.I.R. 1930 Mad. 874 = 59 M.L.J. 513.**

NEGOTIABLE INSTRUMENTS—Delivery.

—Delivery.

The post office is the agent of the person to whom the bill or note is posted if there be express or implied authority to send by post, but if there be no such authority the post office is the agent of the sender. (*Mulla, J.*) THORAPPA DEVANAPPA *v.* UMEDMALJI.
87 I.C. 226=25 Bom. L. R. 604=A.I.R. 1924 Bom. 205.

—Discharge.

The question as to the negotiability or non-negotiability of an instrument is quite distinct from the question of a party's discharge from liability to the holder, and the liability of the drawer of a bill of exchange or of any subsequent party thereto is not in any way affected by the document being negotiable or otherwise. Nor mere cancellation can have the effect of discharging a party from liability unless it is made with the express intention of discharging that party, for if it is made unintentionally or is made under a mistake it will be inoperative. (*Scott-Smith and Moti Sagar, JJ.*) FIRM RATHMAT ALI *v.* FIRM DEIVA SINGH. **75 I.C. 827=4 Lah. 151=5 L.L.J. 361=A.I.R. 1923 Lah. 396.**

—Drafts.

———*D-A drafts—Discounting with a bank—Confirmed credit therefor provided in another bank—Drafts dishonoured after acceptance—Documents of title delivered to consignee on acceptance of drafts—Claim against drawers—Delivery of documents not unreasonable—Drawers are liable in the absence of express contract negativing recourse or breach of contract or other duty having that effect—Discounting is not an out and out sale.*

In respect of a certain forward contract for sale of goods entered into by S. & Co. with K. & Co., the buyers K. & Co. had arranged with E Bank for credit to be available for the discount of the drafts to be drawn in respect of the shipments and S. & Co. were informed by the E Bank that the latter were prepared to make advances and negotiate the drafts if presented to them with their relative bills of lading, invoices and policies and that the above credit was a confirmed one. In respect of August shipment under the contract S. & Co., drew D A drafts on K. & Co. making the bills of lading deliverable against acceptance of the drafts by K. & Co. and discounted the drafts not with E Bank. but with another bank, I bank. The memorandum requesting the I Bank to discount the drafts bore the words "for our 3 M-St D-A drafts on K. & Co. drawn under L-Agreement signed with E Bank". The I Bank delivered the documents to K. & Co. on their acceptance of the drafts and on dishonour at maturity by the acceptors, sued the drawers S. & Co. The defendants contested their liability on the ground that by reason of the discounting transaction, the delivery of the bill of lading to the E Bank became a matter of contract between the parties and that the plaintiff's right of recourse against the defendants was suspended and became ineffectual unless and until the E Bank made default and further that by the delivery of the bills of lading to K.& Co. the plaintiff had impaired the defendants' security of recourse against E Bank available under the confirmed credit.

Held: that having regard to the description of the drafts as D-A drafts, the conduct of the plaintiffs in handing over the bills of lading against the consignees' acceptance was not unreasonable and that any rights of recourse against the E Bank, which might have been available to the plaintiff under the confirmed credit of the E Bank, would not impose on them a duty towards the defendants so as to modify their

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ordinary right of recourse against the drawers under the drafts. To limit the plaintiff's *prima facie* rights of recourse against the defendants, the former must show that when they discounted the drafts, they bargained that the transaction should be without recourse, or some breach of contract or duty on their part which would have that effect in law.

Mere negotiation of the drafts pursuant to exchange broker's contract was in itself an out and out purchase of them by the Bank without recourse to the drawers in any event. (*Viscount Sumner.*) SASOON AND SONS *v.* INTERNATIONAL BANKING CORPORATION.
107 I.C. 225=55 Cal. 1=54 I.A. 317=25 A.L.J. 665=29 Bom. L.R. 1181=46 C.L.J. 61=1 L.C. 241=1927 M.W.N. 648=32 C.W.N. 30=39 M.L.T. 659=A.I.R. 1927 P.C. 195=53 M.L.J. 42 (P.C.).

—Executant.

———*Executant must show his capacity clearly—Cases on contracts have no application.*

In a matter of negotiable instruments which may pass from hand to hand to persons who have no personal knowledge of the original parties at all, the law that it must be clear on the face of the note who has executed it and whose estate is liable for it, must be interpreted more strictly than in the case of a contract; and citations of cases which deal with contracts are of little value in this connexion. The proper principle is that elasticity in the interpretation of the law in the matter of a promissory note is not permissible, and if parties do not make it clear on the face of the note that the executant signing it is binding not himself but some one else, they must themselves take the consequences.

The mere description of the executant as guardian of a minor is not sufficient to indicate that the executant did not intend to bind his own estate but of the minor: 23 Mad. 597, Dist.; 30 I.C. 481; A. I. R. 1925, Mad. 371, Appr. A. I. R. 1926 Mad. 390 and 38 Mad. 482, Foll. (*Wallace, J.*) PERIA MUTHUSWAMI *v.* SOMASUNDARA. **105 I.C. 877=39 M.L.T. 387=A.I.R. 1927 Mad. 1018=53 M.L.J. 814.**

—Hundi.

———*Presentment of Hundi to wrong person who accepted by mistake—Drawee discovering mistake long afterwards—Notice to holder delayed—Drawee is disentitled to sue.*

Where the plaintiffs through negligence wrongly accepted the position as drawees of the hundi, presented by a bank:

Held: that it established for the time being mutual relationship between themselves and the bank who presented the hundi which cast upon them the duty to inform the bank within a reasonable time that they had accepted that position under a mistake of fact. Where there had been gross carelessness on the part of the plaintiffs in not detecting the mistake immediately and also in not intimating the bank of it within a reasonable time after they discovered the mistake,

Held: further that the plaintiffs were not entitled to recover the money from the defendant bank. (*Macleod, C.J. and Coyajee, J.*) RAGHUNATH RAITHKARAN *v.* THE IMPERIAL BANK OF INDIA LTD.,
91 I.C. 342=30 Bom. 49=27 Bom. L.R. 1229=A.I.R. 1926 Bom. 66.

———*Fresh* Hundi *substituted in place of old—The fresh one does not discharge executant from liability unless it is legally enforceable.*

Defendants executed a *hundi*, which was not duly stamped in favour of the plaintiffs by way of renewal of the previous *hundi* and made an endorsement on the back of the latter *hundi* that another *hundi* for Rs. 1,000 had been executed in lieu thereof.

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Held, the giving of the second *hundi* would have operated as a discharge of the previous *hundi* only if the second *hundi*, was legally enforceable. (*Scott-Smith and Moti Sagar, JJ.*) (FIRM) RAHMAT ALI *v.* (FIRM) DEWA SINGH. **75 I.C. 827=4 Lah. 151=5 L.L.J. 361=A.I.R. 1923 Lah. 396.**

———Where a *hundi* is silent as to interest but there is a custom allowing interest if the *hundi* is not met with within a certain time, the drawer is liable to pay interest. (*Maung Kin, J.*) MAUNG PO SIN *v* VELLAYAPPA CHETTY. **62 I.C. 315=10 L.B.R. 321.**

—Liability.

There is a difference between the law relating to liability on ordinary contracts and that on negotiable instrument. (*Wazir Hasan, A. J. C.*) JAGRUP SINGH *v.* RAMA KISHAN DAS. **59 I. C. 596=23 O. C. 353=7 O. L. J. 705.**

—Liability of partners.

No person can be made liable on a negotiable instrument unless his name appears on the promissory note or if it is sought to make him liable as a partner unless the name of the firm in which he is a partner appears on it. 46 Cal. 663 (P.C.) ; 21 M.L.J., 526, Foll. (*Heald and Chari, JJ.*) NAGOOR MEERA *v.* H. M. NAINAR MEERA ALI. **90 I. C. 639=4 Bur. L. J. 110=A. I. R. 1925 Rang. 264.**

—Negotiability.

Negotiability cannot be given to an instrument by agreement of parties or otherwise than by a long established custom of merchants or by statute. A 'delivery order' is not negotiable though it passes from hand to hand as though it were negotiable. (*Schwabe, C. J. and Krishnan, J.*) ADAM HAJI *v.* SAKAVATH HUSSAIN. **70 I.C. 736=1922 M. W. N. 434=31 M. L. T. 40=A. I. R. 1923 Mad. 103=43 M. L. J. 199.**

———*Custom of negotiability—When unreasonable.*

Even if there is evidence that a certain instrument is treated as a promissory note, if its language is such that by no conceivable acceptance of the words in their ordinary significance, it could be so construed, the Court might have to say that, in spite of the proof of the existence of the custom, the custom was so entirely at variance with the tenor of the instrument as to be unreasonable. (*Schwabe, C. J. and Coutts-Trotter, J.*) KAMAL BHOYA *v.* BALARAM PARAMASUKDOSS. **68 I. C. 921=16 M. L. W. 608=31 M.L.T. 284=A. I. R. 1923 Mad. 44=43 M. L. J. 480.**

—Presentation of draft.

The delivery of a draft is conditional payment and if the draft is not met in due course the original debt can be sued on. But if the person to whom the draft is given fails to exercise due diligence in presenting the draft with the result that loss is caused to the drawer then the loss must fall on the party in default and not on the drawer. (*Macleod, C. J. and Crump, J.*) RAMZAN & CO. *v.* SHERIFF MAHOMED HASOON AYUB. **76 I. C. 578=A. I. R. 1924 Bom. 520.**

—Promissory Note.

Principal can sue for recovery of moneys on a promissory note, executed in favour of his agent, without any formal assignment by the agent in favour of the principal. (*Ramesam and Jackson, JJ.*) SU RAMANIA IYER *v.* SUBHAN CHETTIAR. **90 I. C. 1047=21 M. L. W. 696=A. I. R. 1925 Mad. 1130.**

—Renewal.

Blackwell, J.—The question whether the renewal of a bill ought to be regarded merely as the fruit of the original bill must depend on the circumstances of each particular case. (*Marten, C. J. and Blackwell, J.*) MERCANTILE BANK *v.* MASCARENHAS.

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 4—Debentures.

114 I.C. 383=52 Bom. 792=30 Bom. L.R. 1210=A. I. R. 1928 Bom. 407.

—Revolving.

———*Bill revolving at 30 days' sight—Revolving commences after due date and not the date of payment.*

Where "Bills were drawn to the extent of yens 50,000 (Yens fifty thousand) revolving at thirty days' sight" *held*: that the date of actual payment of the bills should not be taken to mark the limit of time for the revolving of the credit but in accordance with the business understanding of such an arrangement it should be held that the revolving would commence after the due date at the particular bill subject to the condition that within any given period the limit of 50,000 yens is not exceeded. (*Shah, Ag. C. J. Pratt, J.*) J. BURJORJI AND CO. *v.* INTERNATIONAL BANKING CORPORATION. **86 I. C. 108=27 Bom. L. R. 27=A. I. R. 1925 Bom. 160.**

—Suit on original cause of action.

———*Insufficiently-stamped hundi, substituted for another—Plaintiff can sue on the original hundi.*

Where an insufficiently-stamped hundi is given in renewal of a prior hundi, the plaintiff can fall back on the prior hundi. The general principle to be followed is enunciated in 7 Cal. 256. The test in a case of this kind is whether the original cause of action exists independently of the hundi subsequently executed: if it does, the creditor can ordinarily sue on it, otherwise not. (*Martineau, J.*) SUNDAR DAS *v.* PURAN SINGH. **67 I. C. 856=11 P. W. R. 1922=A. I. R. 1922 Lah. 56.**

NEGOTIABLE INSTRUMENTS ACT.

(XXVI of 1881, as amended by V of 1914, VIII of 1919, etc.)

—Construction.

In order to construe the Negotiable Instruments Act, it would not be proper to find out what the Law Merchant was before the Act, was enacted: 23 Cal. 563 (P.C.), Rel. on. (*B.B. Ghose and Roy, JJ.*) BROJO LAL SAHA *v.* BUDH NATH PYARI LAL. **105 I.C. 543=55 Cal. 551=A.I.R. 1928 Cal. 148.**

—Scope.

Joint payees were recognised even before the amendment in 1914 of the Negotiable Instruments Act of 1881, but not payees in the alternative. (*Spencer and Odgers, JJ.*) K. P. KUNHI KORANATH CHANDU *v.* A. T. RAMUNNI. **59 I.C. 943=13 M.L.W. 183=A.I.R. 1921 Mad. 122.**

—S. 4—Debentures.

———*Forged endorsement on debentures of Bombay Improvement Trust—Endorsee consolidating old debentures and getting new ones—New ones endorsed to third party* bona fide—*Original owner is not entitled to claim the new debentures from third party.*

The plaintiff was the owner of thirty-one debentures of Bombay Improvement Trust which he entrusted to defendant 1 who was a sub-broker in the Share Bazar in Bombay, to collect interest as it fell due. Defendant 1 forged plaintiff's signatures on the debentures and endorsed them in his own favour. Defendant 1 endorsed them subsequently in favour of defendant 2, a bank, as security for the advances he took from them. Defendant 2 sent the debentures to the Bombay Improvement Trust for consolidation and renewal, and got twelve new debentures for different amounts in their own name. Defendant 1 borrowed a loan from another bank, defendant 3 and paid off defendant 1 who endorsed the twelve new debentures in favour of defendant 3, Defendant 3 retained the

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 4—Negotiable instrument.

debentures as security for the loan advanced to defendant 1. The plaintiff had his suspicion aroused as to the fraud by defendant 1 and filed a suit against the defendants to recover the debentures or their value.

Held : that the debentures were promissory notes and, therefore, negotiable instruments, and that a forged endorsement being no endorsement all subsequent endorsements would be inoperative and invalid, but that the effect of the renewal of the debentures was that the earlier contracts were determined and there was a new contract to pay the consolidated sum, and that defendant 3 were holders in due course of the new debentures and they being a distinct document from the old debentures, they were in no way concerned with any invalidity of the old debentures, nor with any invalidity affecting the surrender by defendant 2 to the Improvement Trust of the old debentures : 24 Bom. 65, Diss. from : Lee *v.* Zagury (1817) 8 Taunt 114, Dist. (*Marten, C.J., and Blackwell, J.*) MERCANTILE BANK *v.* MASCARENHAS.

114 I.C. 383=52 Bom. 792=30 Bom.L.R. 1210= A.I.R. 1928 Bom. 407.

—S. 4—Negotiable Instrument.

———*Mention of quarterly rests—Note is a negotiable instrument.*

The term " quarterly rests " is well known term and means nothing more than that when ultimately the interest comes to be calculated it is to be calculated on a certain basis or system, and by no means gives the holder or the promisee the right to sue for interest apart from the demand for the principal.

Where a promissory note expressed a promise to pay the sum named therein " with interest at 10 per cent. per annum with quarterly rests."

Held : that the note was for a sum certain within Ss. 4 and 5 of the Act and, therefore, a negotiable instrument : 18 Bom. L. R. 124 and A.I.R. 1923 Lah. 29, Dist. (*Mullick, Ag., C.J., and Wort, J.*) LAKSHMINATH *v.* BENARES BANK LTD.

115 I.C. 201=7 Pat. 41=A.I.R. 1929 Pat. 136.

—S. 4—Pro-note.

It is not because a document is not payable to order or bearer that it is excluded from the definition of promissory note ; and even a document which contains simply promise to pay on demand a certain sum to a specified person is a promissory note : 29 Bom. 82 Expl. (*Jackson, A.J.C.*) BANKIDAS *v.* SANABAI.

118 I.C. 673=12 N.L.J. 72=25 N.L.R. 173= A.I.R. 1929 Nag. 274.

———A deed narrated that partnership accounts were settled and a certain amount was found due from the defendant to the plaintiff and the defendant promised to pay that sum to the plaintiff *wakte zaruart*. The word 'pro-note' was also used in the document.

Held: that the deed was a pro-note. (*Dalal, J. C.*) MATA PRASAD *v.* NARAIN PRASAD. **86 I. C. 482= A. I. R. 1925 Oudh 560.**

———*Mere mention of interest—No undertaking to pay—Instrument is not a pro-note.*

A document was in the following terms:—*Age rupai nau snu tumhare hamare pas jama hainge. Biyaj dar das anne sainkra denge. Held* that the document does not contain any unconditional undertaking to pay the principal sum of money and the only undertaking given is to pay interest at the rate of ten annas per cent. per mensem. The document clearly is an acknowledgment of a debt and not a promissory note within the meaning of Section 4. (*Moti Sagar, J.*) FIRM NAEK CHAND, KISHORI LAL *v.* FIRM RAM SARUP, GUJAR MAL. **78 I.C. 163= A.I.R. 1924 Lah. 684.**

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 5—Hundi.

———Where the document was in the shape of a request to the plaintiff to pay the defendants Rs. 500 which the defendants would pay with interest.

Held that this was a conditional contract and not a promissory note under the Negotiable Instruments Act. (*Jwala Prasad and Ross, JJ.*) SARJU SAHU *v.* SUKHI LAL. **79 I.C. 420=4 P.L.T. 577= A.I.R. 1924 Pat. 96.**

———An alleged promissory note ran as follows:—I promise to pay on demand at my convenience.....

Held, that it was not a promissory note as the promise was not unconditional.

Held further, that considered as an agreement the promisee could not succeed in his suit against the promisor if he could not prove that the defendant was able to pay. (*Kanga, J.*) NATHOOBHAI DALLABHAI *v.* HIMATLAL. **23 Bom. L.R. 1231= A.I.R. 1921 Bom. 336.**

—S. 4—Surety.

There is an essential antithesis between the legal position of a surety and that of the executant of a promissory note and so a person who executes a promissory note cannot be held in law to have the position of a surety: A.I.R. 1924 Rang. 360, Dist. (*Niamatullah and Bennet, JJ.*) BEHARI LAL *v.* ALLAHABAD BANK LTD., CAWNPORE. **1929 A.L.J. 1137= A.I.R. 1929 All. 664,**

—S. 5—Bill of Exchange.

———*Drawer and Drawee same person, bill of exchange.*

There is nothing in S. 5 to support the argument that if the drawer and drawee be the same person the instrument cannot be described as a bill of exchange. It is true that where the drawer and the drawee is the same person that person is not entitled to treat the instrument as a bill of exchange but the holder of the bill may treat it as a bill of exchange: *Capital and Counties Bank* v. *Gordon*, (1903) A.C. 240, Foll. (*Das and James, JJ.*) BIBI KAZMI BEGAM *v.* LACHMAN LAL SAO.

A.I.R. 1930 Pat. 239.

NEGOTIABLE INSTRUMENTS ACT (26 of 1881). —S. 5—Hundi.

———*Hundi in the form of a promissory note—Acceptance by third party not named as drawee—Liability of.*

An instrument, called a "hundi" but in the form of a promissory note, becomes a bill of exchange, on the acceptance of a third party, though the bill is not addressed to him and he is not named as drawee, provided his acceptance is not inconsistent with the address. No party can be made liable as acceptor of a bill addressed to another but where no party is named in the address, the acceptor may be deemed, by his endorsement of acceptance, to have admitted himself to be the party addressed. *Lloyd* v. *J. E. Oliver*, 18 Q.B. 471; *Davis* v. *Clarke*, 6 Q.B. 16; *Gray* v. *Milner*, 8 Taunt. 739 ; *Steele* v. *M'Kinlay*, 5 A.C. 754, Ref. to. (*Graham and Mitter, JJ.*) JOGESHCHANDRA DHAR *v.* MAHOMED IBRAHIM.

57 Cal. 695=A.I.R. 1930 Cal. 697.

———*Shahjog hundi—Negotiability and nature.*

A Shahjog hundi in its inception is a hundi which passes from hand to hand by delivery and requires no endorsement. The name of the depositor is mentioned in the body of the hundi, but there is no direction in the hundi that the amount is to be paid either to the depositor or to his endorsee. Indeed, the body of the hundi requires that the amount be paid to a Shah. It contemplates the hundi passing from hand to hand until it reaches a Shah who, after making due

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 5—Hundi.

enquiries to secure himself, would present it to the drawee for acceptance or for payment.

Absence of an endorsement on the hundi would not affect its validity if it is a Shahjog hundi. But a Shahjog hundi, although in its inception it is one which passes by delivery without any endorsement yet it may at any moment be restricted by being specially endorsed. Where any such restriction applies on the face of the hundi then that restriction applies to it and it ceases to be a bearer hundi which can pass from hand to hand. Anybody taking it after such endorsement has to comply with the requisitions as they appear on the face of the hundi and has to examine the title of the holder in the light of such endorsements.

The negotiability of the Shahjog hundi as a bearer hundi comes to an end when it reaches the hands of the Shah who presents it for acceptance or for payment. If after acceptance the Shah were to endorse it to a person of straw the drawee would be within his right to refuse to honour the hundi, for the one condition which applies to these hundis is that at the time of payment there would be an immediate relationship established between a Shah and the drawee. A drawee is entitled to have the immediate responsibility of the Shah established between himself and the Shah. (1869) 6 B. H. C. R. 24; 7 Beng. L.R. 289 N.; and 5 C.W.N. 313, Ref. (*Mirza, J.*) CHAMPAKLAL *v.* KESHRICHAND. **98 I.C. 555=50 Bom. 765=28 Bom. L.R. 897=A.I.R. 1926 Bom. 471.**

———The bearer of a ShahJog Hundi although a minor, is entitled to sue on the Hundi. (*Macleod, C.J. and Coyajee, J.*) RAMPRASAD *v.* SHRINIVAS. **90 I.C. 685=27 Bom. L.R. 1122=A.I.R. 1925 Bom. 527.**

———*Suit based on—Presentment and notice of dishonour must be proved—But plff. may show that the case is one in which presentment is unnecessary.* (*Lindsay and Kanhaiya Lal, JJ.*) GENDA LAL *v.* BALKISHAN, **70 I.C. 596=A.I.R. 1922 All. 422.**

———*Loan—Hundi inadmissible—Oral contract cannot be proved.*

Where the terms of any contract have been reduced to writing and that writing is, for any reason, inadmissible the promisee must lose his money. Therefore, where advancing of a loan and the execution of the hundi are simultaneous transactions, and the contract for repayment is embodied in the hundi, but the hundi is inadmissible in evidence due to insufficient stamp, the creditor cannot rely on the original consideration. 16 I.C. 33 dissented from. Case-Law referred. (*LeRossignol and Wilberforce, JJ.*) GURDASMAL SINGH *v.* ISHAR DAS. **60 I.C. 107=3 L.L.J. 157=A.I.R. 1921 Lah. 217.**

———*Signature of drawer—Whether should appear at a particular place.*

The name of the drawer of *hundi* need not be separately entered on a document at any specific place but it is sufficient if it is introduced in a document to show the person addressed, that it has been made by a third psrson who purports to be bound thereby. (*Mullick and Bucknill, JJ.*) SURAJ MULLA HAR PRASAD *v.* BANK OF BEHAR. **60 I.C. 746=3 U.P.L.R. (P.) 46.**

—S. 6—Cheque.

In India a post-dated cheque is admissible in evidence although it bears stamp representing duty payable in respect of a cheque, and not an *ad valorem* duty payable in respect of a bill of exchange. 16 Cal. 432 Rel. on. (*Page, J.* WALTER MITCHELL *v.* A K. TENNENT. **90 I.C. 59=52 Cal. 767=A.I.R. 1925 Cal. 1007.**

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 8—Suit on—Pro-note, —S. 7—Acceptance.

Mere writing of figures on the hundi cannot amount to the signing of assent by the drawee unless it can be proved that it amounted to acceptance according to the mercantile usage of the locality. (*Jailal and Agha Haidar, JJ.*) GURDAS MAL RAMCHAND *v.* KHEM CHAND PREM SINGH. **A. I. R. 1930 Lah. 471.**

—S. 7—Oral acceptance.

An oral acceptance of a bill does not make the so-called acceptor liable to the holder of the bill: 29 P.R. 1919 and A.I.R. 1924 All. 129, Foll. (*Jai Lal and Agha Haidar, JJ.*) GURDAS MAL RAMCHAND *v.* KHEM CHAND PREM SINGH. **A.I.R. 1930 Lah. 471.**

———Possibly by local custom, hundis may be accepted verbally but any such local custom must be specifically set up and proved by evidence. (*Daniels, J.*) DWARKADAS AJODHYA PRASAD *v.* LACHMI NARAIN GIRDHARILAL. **74 I. C. 692=4 L.R.A. Civ. 355=A.I.R. 1924 All. 129.**

—S. 7—Payee.

Where the payee signs his name and makes it payable to some other person, that other person does not become the payee within the meaning of S. 85. (*Kajiji, J.*) JAGJIVANDAS *v.* NAGOR CENTRAL BANK. **93 I. C. 619= 50 Bom. 118=28 Bom. L. R. 226=A.I.R. 1926 Bom. 262.**

—S. 8—Endorsement.

A pro-note endorsed in blank is payable to bearer, and it cannot be said that the bearer is not a person entitled in his own name to hold the pro-note because his name is not given in the endorsement : 30 Mad. 88, Rel. on. (*Phillips and Thiruvenkatachariar, JJ.*) RAMANANDAN *v.* GUNDU. **113 I.C. 456=1928 M.W.N. 680=A.I.R. 1928 Mad. 1238.**

—S. 8—Suit on.

———*Promissory note taken in the name of the benamidar—Suit by the real owner—Maintainability.*

Under the English Law, a person not named in a promissory note would be debarred from maintaining a suit on the note on the allegation that he was the real beneficiary and that the person named was his trustee or agent, but in India benami transactions are recognised and there is no reason why the real owner should not institute a suit on a promissory note executed in the name of his benamidar, if the benamidar admits that he is the benamidar for the real owner, (*Kulwant Sahay, J.*) SURJUG SINGH *v.* DEOSARAN SINGH. **123 I.C. 395.**

—S. 8—Suit on—Pro-note.

Benamidar is a holder within the meaning of S. 8 and is entitled to sue on promissory-note : 30 Mad. 88 (F. B.) ; 2 C.W.N. 386; A.I.R. 1922 All. 70 and 5 L.B.R. 198, Rel. on. (*Sen and Heald, JJ.*) POG.HTIN MAUNG *v.* SAW HLA PRU. **A.I.R. 1930 Rang. 243.**

———"*Holder,*" *meaning of—Person who is not an endorsee cannot claim payment under it.*

Where the plaintiff claimed payment of the amount due on the promissory-note which was not endorsed to him, alleging that the money advanced thereon was his and was advanced on his behalf.

Held : that the plaintiff could not claim payment as in a promissory-note not payable to the bearer "the person entitled in his own name" can only mean the person named in the note, that is the payee or the endorsee. The doctrine of benami cannot be applied in a case like this where the law by clear implication excludes its application. The application of the doctrine to negotiable instruments would introduce an element of uncertainty into them and hamper commerce : 28 Mad. 205 ; 30 Mad. 88 and

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 8—Suit on—Pronote.

A.I.R. 1922 All. 70, Foll. (*Kotval, A.J.C.*) VISHNU *v.* ACHUT. **105 I.C. 780=A.I.R. 1928 Nag. 54.**

———In a suit upon a pro-note, a Court should not allow evidence to show that the pro-note was not really executed in the plaintiff's favour or evidence that the note had been discharged by payment to the person really interested : 30 Mad. 88 (F.B.). Foll. (*Ashworth, J.*) MADAN LAL *v.* LAL CHAND. **100 I.C. 703= 49 All. 457=25 A.L.J. 402=A.I.R. 1927 All. 463.**

———Promissory note in name of benamidar—Beneficial owner cannot sue. 21 Mad. 391, dissented, 28 Mad. 205 foll., 15 A. L. J. 695 followed. (*Ryves and Gokul Prasad, JJ.*) REOTI LAL *v.* MANNA KUNWAR. **65 I.C. 785=20 A.L.J. 126= 44 All. 290=A.I.R. 1922 All. 70.**

—S. 9—Endorsement by guardian.

Endorsement of a promissory note by the guardian without an indication that the guardian has endorsed it in his capacity as a guardian does not pass title to the endorsee who therefore is not a holder and has no *locus standi* to sue on the pro-note. (*Wallace, J.*) SUPPAI GOUNDAN *v.* KANDASWAMY GOUNDAN, **80 I. C. 567=19 M.L.W. 560= A.I.R. 1924 Mad. 617.**

—S. 9—Holder for value.

———*Stale cheque—Right of holder.*

A cheque is payable on demand and the amount becomes payable when the cheque is presented for payment to the drawee, and a holder after it is presented for payment is not a holder in due course.

Where plaintiff took a stale cheque in good faith for consideration without notice of dishonour and without having any reason to believe that there was any defect in the title of his transferror, who, however, was not a holder for value and the endorsement to him was fictitious.

Held : that plaintiff could not be regarded a "holder" in due course and his claim against the drawer must fail. (*Lindsay and Kendall, JJ.*) RAM SARUP *v.* HARDEO PRASAD. **108 I.C. 144= 50 All. 309=25 A.L.J. 1091= A.I.R. 1928 All. 68.**

———A person holding a bill of exchange sent to him for collection with a lien on the bill is a holder for value or for consideration. (*Shah, Ag. C. J.*) ROYAL BANK OF SCOTLAND *v.* RAHIM CASSUM AND SON. **87 I. C. 982=49 Bom. 270=A.I.R. 1925 Bom. 369= 27 Bom. L.R. 506.**

—S. 9—Holder in due course.

Where in partition a promissory-note is simply allotted to a person but which note never comes into his possession, and the note is payable to a third person and not to bearer, the former person cannot be a holder in due course ; that being so, he cannot make his assignees by a release deed holders in due course. (*Wallace, J.*) NARAYANA MOORTHI *v.* VUMAMAHESWARAM. **122 I.C. 345=A.I.R. 1930 Mad. 197.**

———*Rights of ultimate holder in due course.*

Unless a person proves that he is a holder in due course within the meaning of S. 9, he cannot have any higher or superior rights against the drawer than the intermediate holders themselves would have, and that, the person knows of the defect of title of the intermediate holders is enough to disentitle that person to the benefits of a holder in due course : 7 *M. H. C.* 271 ; 5 *Mad.* 108 and 33 *Mad.* 34 *Ref.* (*Anantakrishna Ayyar, J*). KURUNDILIAMMAL *v.* KUNHI KANNAN. **123 I.C. 596=A.I.R. 1930 Mad. 141.**

———*Negotiable Instrument obtained by fraud and endorsed to holder—Holder to prove that he is holder for value and that he obtained instrument before it became payable and without having cause to suspect endorser's title.*

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 9—Holder in due course.

Under S. 58, when a negotiable instrument has been obtained from any maker by fraud or for an unlawful consideration, the ordinary presumption that the holder is a holder in due course is rebutted and the case comes under the proviso to S. 118 (g) and the burden of proving that the holder is a holder in due course lies upon the holder. As required by S. 9, the holder, in order to prove that he is a holder in due course, has not only to show that he is a holder for value but further he has to show that he became the holder of the instrument before it became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. (*Phillips and Thiruvenkatachariar, JJ.*) RAMANADAN CHETTIAR *v.* GUNDU AYYAR. **113 I.C. 456=1928 M.W.N. 680= A.I.R, 1928 Mad. 1238.**

———Where the endorsee has no sufficient cause to believe that there was any defect in the title of the person from whom he derived his title he is a holder in due course, and the presumption in S. 118 will be in favour of the endorsee. (*Kulwant Sahay, J.*) KISHEN BAHADUR *v.* SASSARAM LIMITED. **80 I.C. 572= 2 Pat. L.R. 54=A.I.R. 1924 Pat. 521.**

—A promissory note payable on demand does not for the purposes of S. 9, become payable until a demand is actually made, and if there is no evidence to show that the transfer of the note was made after the demand, it is perfectly valid transfer. To constitute a person a holder in due course it is necessary that (1) he must be a holder for consideration, (2) the note must have been transferred to him before it became payable, and (3) he must be a transferee in good faith. (*Campbell and Moti Sagar, JJ.*) BULAQI MAL *v.* ABDUL RAHIM. **75 I.C. 950= A.I.R. 1923 Lah. 638.**

———When a person is under a disability with respect to his property, his title thereto is not without defect. If the endorsee is aware of this disability he has sufficient cause to believe that a defect existed. He is not therefore a holder in due course. (*Phillips and Devadoss, JJ.*) SUBRAMANIA *v.* CHOKKALINGA. **72 I.C. 189=46 Mad. 415=17 M.L.W. 314= 1923 M.W.N. 91=A.I.R.1923 Mad. 317= 44 M.L.J. 206.**

———Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue. 44 Cal. 978, Dist. (*Mookerjee and Chaudhuri, JJ.*) SHAHA & CO. *v.* BENGAL NATIONAL BANK LTD. **60 I.C. 940= 33 C.L.J. 541=A.I.R. 1921 Cal. 302.**

———*Forged endorsement confers no right on endorsee—Holder under forged endorsement is not holder in due course.*

A forged endorsement is a nullity and conveys no title to the endorsee. It is as much a nullity as a forged cheque or a forged hundi provided there has been no negligence on the part of the true owner in allowing the instrument to come into the hands of the forger. *Obiter dicta* of Stephen, J. in 32 Cal. 799 Diss. from. 36 Cal. 239 ; 28 All. 428 and 24 Bom. 65 Foll.

A holder under such a forged endorsement is not a holder in due course. A Bank takes a risk in accepting as security for an advance a negotiable security

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 9—Rights of real owner,

payable to order because it may always be met with a claim by the true owner that the endorsement is forged. (*Kemp, A. J. C.*) KODUMAL KALUMAL *v.* KARACHI BANK, LTD. **82 I.C. 730= 15 S.L.R. 93=A.I.R. 1921 Sind 172.**

—S. 9—Rights of real owner.

The right of the real owner is not affected by the Act if his name be disclosed to the maker of the instrument and if the maker does not make any payment to the holder and get a discharge from him; A. I. R. 1928 Cal. 148, Rel. on. (*Aston, A. J, C.*) ATMARAM MOHANLAL & SONS. *v.* NOTANDAS DEVI DAYAL. **A.I.R. 1930 Sind 4.**

—S. 9—Suit on pro-note.

No one can sue on a negotiable instrument as holder unless he is named therein as the payee or unless he becomes entitled to it as endorsee or bearer : 30 Mad. 88 (F. B.), Rel. on. (*Wallace, J.*) NARAYANA MOORTHI *v.* VUMAMAHESRAM. **122 I.C. 345= A.I.R. 1930 Mad. 197.**

—S. 11—Inland Bill.

———*Bill drawn in England on a person resident in British India.*

A bill drawn upon a resident in British India is an inland bill as defined in S. 11 of the Act, wherever it may have been drawn, in or out of British India. (*Buckland, J.*) KINDSTON & CO., LTD. *v.* SETH BROTHERS. **57 Cal. 730=A.I.R. 1930 Cal. 693.**

—S. 13—Interpretation.

Explanation (i) introduced by Act 8 of 1919 to S. 13 of the Negotiable Instruments Act of 1881 cannot be read into the definition of a bond as contained in S. 2 (5) (b) of the Stamp Act so as to make an instrument which on the face of it is not payable to order, one payable to order by virtue of the said explanation and thus to take it out of the said definition. For the purposes of the Stamp Act the documents as they appear on the face of them, have to be considered. A document which is attested by witnesses and is not payable to order or bearer is a bond within the meaning of the Stamp Act and should be stamped as such. (*Mukerji and Graham, JJ.*) KHETRA MOHAN *v.* JAMIND KANTA. **100 I.C. 630= 54 Cal. 445=A.I.R 1927 Cal. 472.**

—S. 13—Negotiable Instrument.

An instrument executed on 22nd June 1922, ran as follows "To Bhai Kanhaia Lal Lachman Lal, whose compliments please accept. Further we draw hundi for Rs. 1,000 full double of 500 rupees the half thereof in favour of Mt. Kajmi Begum Sahiba dhanijoge. Please pay after 60 days from Miti Asarh Badi, 12, 1979, Sambat' according to the rules of Hundi. Dated Miti Asarh Badi 12, 1979 Sambat by pen of Raja Ram."

Held : that the instrument was payable to order and was therefore a negotiable instrument within the meaning of S. 13. This being the position the holder is clearly entitled to the benefit of S. 22 and the bill matured on 24th August 1922. (*Das and James, JJ.*) BIBI KAZIM BEGAM *v.* LACHMAL LAL SAO. **A.I.R. 1930 Pat. 239.**

———Where the chithi or demand note does not mention the person to whom the amount is to be paid, it is not a negotiable instrument. (*Rupchand, A. J. C.*) ASSARAM MOTIRAM, *In re.* **116 I.C. 111= A.I.R. 1929 Sind 164.**

———The hundis which are known in the Indian commercial circles as "*danijogi*" hundis are negotiable instruments and payable to bearer. (*Banarji and Weir, JJ.*) GHURE RAM NURU RAM *v.* MOLAM-

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 17—Hundi.

MAD YUSUF BHOLE NATH. **111 I.C. 686= A.I.R. 1928 All. 549.**

———The debentures issued by the Bombay Municipality are not in the ordinary form of a negotiable instrument and are not negotiable instruments either under the Negotiable Instruments Act or otherwise, in the absence of evidence of custom of the market. (*Marten, C.J. and Blackwell, J.*) MERCANTILE BANK *v.* D'SILVA. **112 I.C. 824=52 Bom. 810= 30 Bom. L.R. 1225=A.I.R. 1928 Bom. 436.**

———Promissory note which makes the payment due to a specified person only is a negotiable instrument within the meaning of Expl. 1 to S. 13 as amended by Act VIII of 1919. 13 A. L. J. 683 Dist. (*Ryves, J.*) SUNDER KHATIK *v.* MAHADEO PANDE. **87 I.C. 796= 23 A.L.J. 253=A.I.R. 1925 All. 282.**

———A pro-note not expressly made payable to a particular person or his order is a negotiable instrument if there is nothing to show that it was intended to be not transferable. (*Rupchand Bilaram, A. J. C.*) THAKURSEY HANSRAJ *v.* KISHENDAS REWACHAND. **76 I.C. 282=A.I.R. 1925 Sind 9.**

———Under this definition a negotiable instrument means a promissory note, bill of exchange, or cheque payable either to order or to bearer, and a promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable. (*Moti Sagar, J.*) HANS RAJ *v.* LACHMI NARAIN. **A.I.R. 1923 Lah. 388.**

———Shah Jog Hundis are Neg. Instruments. (*Schwabe, C.J. and Coutts Trotter, J.*) KANLAL BHOYA *v.* BALARAM PARAMAGUR DOSS. **68 I.C. 921= 16 M.L.W. 608=31 M.L.T. 284= A.I.R. 1923 Mad. 44=43 M.L.J. 480.**

—S. 15—Endorsement.

Signature on the back of negotiable instrument of a person, neither the maker nor the holder thereof, is not an endorsement. (*Rupchand Bilaram, A. J. C.*) THAKURSEY HANSRAJ *v.* KISHENDAS REWACHAND. **76 I.C. 282= A.I.R. 1925 Sind 9.**

—S.16—Discharge.

Section 16 (2). which is added by Act V of 1914, gives protection under S. 85 to the drawee, and in the case of indorsee also if the signature of the indorsee is not genuine. (*Kajiji, J.*) JAGJIVANDAS *v.* NAGAR CENTRAL BANK. **93 I.C. 619=50 Bom. 118= 28 Bom. L.R. 226=A.I.R. 1926 Bom. 262.**

—S. 16—Endorsement.

An acknowledgment of the payment signed by one of the alternative payees is neither an endorsement in full, nor, an endorsement in blank and it cannot be treated as effecting an assignment of actionable claims under S. 130, Transfer of Property Act because there are absolutely no words of transfer. (*Spencer and Odgers, JJ.*) K.P. KUNHI KORANATH CHANDU *v.* A.T. RAMMUNI. **59 I.C. 943=13 M.L.W. 183= A.I.R. 1921 Mad. 122.**

—S. 17—Hundi.

———*Hundi ambiguous as to whether promissory note or hundi held to be hundi—Deed—Construction.*

The document in question was in the following form on a paper, which was described as a "hundi" in print: "Forty-five days after date without grace we jointly and severally promise to pay to the order of J the sum of one thousand rupees only for value received in cash and that with interest at 3 per cent. per annum after due date."

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 20—Inchoate instrument.

In the corner at the top, was the endorsement: "Accepted payable on the date 23rd September." Below this endorsement there were two signatures.

Held: That it was a bill of exchange, as defined in S. 5 of the Act, and, even if there was any ambiguity about its being either a promissory note or a bill of exchange, the holder of the bill is entitled to treat it as either having regard to the provisions of S. 17: *Lloyd v. John Edward Oliver*, (1852) 11 Q.B. 471, Rel. on. (*Graham and Mitter, JJ.*) JOGESH CHANDRA DHAR v. MAHAMMAD IBRAHIM. **57 Cal. 695 = A.I.R. 1930 Cal. 697.**

—S. 20—Inchoate instrument.

It is a valid pro-note, though the amount is not mentioned in the body of the document if it is mentioned somewhere on the document. If the amount can be ascertained from the face of the paper, the form of expression is immaterial. (*Duckworth, J.*) MAUNG PO YE v. YE CHEIN HONG. **70 I.C. 323 = 1 Bur. L.J. 172 = 11 L.B.R. 439 = A.I.R. 1923 Rang. 97.**

———*Blank Hundi—Right of holder in due course.*

A person who gives another possession of his signature on a hundi *prima facie* authorises the latter as his agent to fill it up and give to the world the bill as accepted by him. He enables his agent to represent himself to the world as acting with a general authority, and cannot say to a *bona fide* holder for value, who has no notice of secret stipulations, that there were secret stipulations between himself and the agent. (*Macnair, A. J. C.*) SHANTIDAS v. HIRALAL. **59 I.C. 657 = A.I.R. 1921 Nag. 113.**

—S. 22—Maturity.

In the case of promissory notes payable on demand the amount due on them does not become payable and the instrument therefore cannot be said to be overdue until there is a demand : 7 M. H. C. R. 271 ; 5 Mad. 108 ; and 33 Mad. 34, Foll. (*Phillips and Thiruvenkatachariar, JJ.*) RAMANANDAN v. GUNDU. **113 I.C. 456 = 1928 M.W.N. 680 = A.I.R. 1928 Mad. 1238.**

—S. 26—Liability.

———*Pro-note in individual name of manager—Liability of members of joint family.*

When a person executes a promissory note in his own name and not as agent acting in the name of another, the maker whose name appears in the promissory note can alone be made liable thereunder. Hence members of a joint Hindu family cannot be held liable in a suit filed on a promissory note signed by one of its members in his individual capacity even though the maker of the promissory note may be proved to be the manager of the family.

It would be dangerous in the extreme to permit evidence to be given that the person who had signed a negotiable instrument was in fact the agent of an undisclosed principal : A. I. R. 1923 Bom. 244 ; 30 Mad. 88 (F. B.); A. I. R. 1918 P. C. 146 and A. I. R. 1928 Bom. 516, Appl; 23 Mad. 597, Disc. and Dist. (*Shingne, J.*) MANCHERSHA ARDESAR v. GOVIND GANESH JOSHI. **32 Bom. L.R. 1035 = A.I.R. 1930 Bom. 424.**

———Where a person is to be bound by a negotiable instrument made on his behalf by his agent, his name must appear upon it as a person to be bound thereby. (*Buckland, J.*) HARI MOHAN GHOSE v. SURENDRA NATH MITTER. **88 I.C. 1025 = 41 C.L.J. 535 = A.I.R. 1925 Cal. 1153.**

—S. 27—Agency.

———*Person signing Hundi—Plea of agency.*

In an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal : A. I. R. 1918 P. C. 146, Foll.

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 28—Interpretation.

A hundi was in the following terms : "Fifty-six days after date I promise to pay Seth Chimandas Fatehchand or order the sum of Rs. 600 only for value received in cash. G. V. Athale, Managing Proprietor, Gangadhar & B, Friends, Sandhurst Road, Bombay No. 4."

Held : that the person liable on the hundi was Athale and not any alleged firm passing under the name of Gangadhar & B. Friends. (*Marten, C. J. and Blackwell, J.*) SITARAM v. CHIMANDAS. **115 I.C. 400 = 52 Bom. 640 = 30 Bom. L.R, 1300 = A.I.R. 1928 Bom. 516.**

—S. 27—Liability.

———*Promissory note signed by managing agent of company—Articles of Association not permitting agent to sign—Company whether liable.*

Where the promissory note was signed by *T* and below his signature appeared the word " Managing Agent, D. & Co.", but it appeared that the Articles of Association of the said company did not authorize *T* to sign the note, *held*, that the executant was not an authorised agent and that the company was not liable under the note. (*Mukerji and Bennet, JJ.*) JHANDHU MAL & SONS v. THE OFFICIAL LIQUIDATORS OF THE DHERA DUN ELECTRIC TRAMWAY CO. **1930 A.L.J, 1052.**

———*Hundi signed by partner—Signature preceded by word " dustkhat "—Firm liable on hundi.*

Where it is evident from an instrument that the intention is to make a firm liable it is not necessary that the name of the firm should be written immediately above the signature of the person signing that instrument.

A hundi purported to come from a firm ; on the instrument were words purporting to show the drawer as the firm. After giving compliments of the firm it proceeded "further we have drawn on you one receipt for Rs. 1,000." The signature of the partner of the firm who signed the hundi was preceded by the word "dustkhat."

Held : that the prefixing of "dustkhat" to the signature denoted that the person incurred no personal liability on the instrument. It was the firm which was to be liable on the instrument and not the partner, (1909) 1 K. B. 792 ; A. I. R. 1918 P. C. 146 and 2 S. L. R. 11, Rel. on. (*Aston, A. J. C.*) ATMARAM MOHANLAL AND SONS. v. NOTANDAS DEVI DAYAL. **A.I.R. 1930 Sind 4.**

—S. 27—Undisclosed principal.

The effect of S. 27 is that the principal can only be made liable through his agent on a negotiable instrument when the agent acts in his principal's name, that is, when he signs as agent and that an undisclosed principal cannot be sued on a negotiable instrument : 30 Mad. 88 (F.B.) ; A. I. R. 1918 P. C. 146, Rel. on.; A. I. R. 1925 Cal. 1052 ; A. I. R. 1928 Bom. 516, Dist. (*Jackson, A.J.C.*) BANKIDAS v. SANABAI. **118 I.C. 673 = 12 N.L.J. 72 = 25 N.L.R. 173 = A.I.R. 1929 Nag. 274.**

—S. 28—Interpretation.

The language of S. 29 is widely different from that of S. 28. Under S. 28 it is sufficient to indicate that personal liability is excluded. Under S. 29 there must be express words limiting the liability, and under S. 28 the agent's liability may be altogether excluded but under S. 29 the executor's liability can only be

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 28—Liability.

limited to the extent of the assets. (*Venkatasubba Rao and Madhavan Nair, JJ.*) SUBBANNA *v.* SUBBARAYUDU. **92 I.C. 805=A.I.R. 1926 Mad. 390=50 M.L.J. 125.**

—S. 28—Liability.

The essence of a tripartite arrangement between a third person, promisor not an agent of the third person and promisee was to conceal third person's indebtedness from the promisee and to make him believe that the promisor was the debtor. The promisor lent himself to the scheme fully understanding that its object was the deception of the promisee.

Held : that the promisor was not induced by the promisee to believe that he would not be held liable upon his promissory notes within the meaning of S. 28; A.I.R. 1926 Oudh 248, Reversed. (*Sir George Lowndes*). NATIONAL BANK OF UPPER INDIA LTD. *v.* BANSIDHAR. **121 I.C. 193=34 C.W.N. 145=31 M.L.W. 1=1930 M.W.N. 1=6 O.W.N. 1136=51 C.L.J. 56=32 Bom. L.R. 136=57 I.A. 1=A.I.R. 1929 P.C. 297 (P.C.).**

—S. 28—Liability of firm.

Section 28 can have no application to a case where it is found that the defendant signed the *Hundi* as *munim* of a firm and that money was lent not to him in his personal capacity but to the firm. (*Banerji and Gokul Prasad, JJ.*) HAZARI LAL CHHANGA MAL *v.* SOHAN LAL. **75 I.C. 609=A.I.R. 1923 All. 407.**

—S. 28—Liability of maker.

Where a third party as well as the promisee induced the executant of a pro-note to sign it assuring that the third party only would be liable, the executant cannot be held personally liable by the promisee on the pro-note. (*Stuart, C. J. and Ashworth, J.*) NATIONAL BANK, UPPER INDIA *v.* BANSIDHAR. **92 I.C. 94=3 O.W.N. 83=A.I.R. 1926 Oudh 248.**

———*Drawer of note apparent on face of instrument—Persons merely signing instrument are not liable.*

Where the preliminary words of the Hundi clearly indicated that the drawers of the Hundis were the firm of Budhumal and that their name was the real name of the persons liable on the Hundis, *held* that the mere fact that the defendants signed the Hundis without mentioning that they were doing so as agents or servants of the firm will not make them personally liable under the Hundi. (*Abdul Raoof and Moti Sagar, JJ.*) MOOL CHAND *v.* MUL CHAND. **71 I. C. 951=4 Lah. 142=A. I. R. 1923 Lah. 197.**

———Where the maker of a negotiable instrument does not indicate that he signed it as an agent nor is there anything in the document itself indicating that the executant did not thereby incur personal liability, the executant is personally liable. (*Newbould and Panton, JJ.*) DURGA PRASAD SEN *v.* KALI CHARAN AICH ROY. **64 I. C. 742 (Cal.)**

—S. 28—Liability of Partners.

Where a promissory note has been signed personally by all partners of a firm individually, adjudication of one of the partners in the firm's name, as insolvent and his composition with the creditors will not absolve the other partners, who were no parties to the insolvency proceedings and the composition, from their personal liability under the promissory note. (*Pratt, O. C. J. and Cunliffe, J.*) K. C. K. FATIMA BIBI *v.* MOHIDEEN. **10 [illegible] C. 277=4 Rang. 551=A. I. R. 1927 Rang. 99.**

—S. 28—Scope.

The principle [illegible] S. 28 applies to cases of guardian and ward. 46 Cal. 663 (P.C.), Foll. (*Venkatasubba Rao and Madhavan Nair, JJ.*) SUBBANNA *v.* SUBBARAYUDU. **92 I.C. 805=A.I.R. 1926 Mad. 390=50 M.L.J. 125.**

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 31—Forged cheque.

—S. 28—Signing by Agent.

Where a bill of exchange is accepted by an agent of the drawee instead of by drawee himself the acceptance is good. The hand that holds the pen is immaterial if in fact there is authority to sign : A. I. R. 1918 P. C. 146, Ref. (*Graham and Mitter, JJ*). JOGESHCHANDRA DHAR *v.* MAHAMMAD IBRAHIM. **57 Cal. 695=A.I.R. 1930 Cal. 697.**

—S. 29—Legal representative.

The term "legal representative" in S. 29 includes executors or administrators. (*Venkatasubba Rao and Madhavan Nair, JJ.*) SUBBANNA *v.* SUBBARAYUDU. **92 I.C. 805=A.I.R. 1926 Mad. 390=50 M.L.J. 125.**

—S. 29—Liability of executor.

Section 29 is meant to be applicable where a person signs a promissory note without adding anything to show that he is acting as executor or administrator of another but not where the payee deals with the promissor as an executor. (*Crump, J.*) PESTONJI *v.* BAI MEHERBAI. **112 I.C. 740=30 Bom. L.R. 1407=A. I. R. 1928 Bom. 539.**

———It is not necessary for the applicability of S. 29 that the alleged executor should be executor in fact. (*Venkatasubba Rao and Madhavan Nair, JJ.*) SUBBANNA *v.* SUBBARAYADU. **92 I. C. 805=A. I. R. 1926 Mad. 390=50 M. L. J. 125.**

———Unless the liability is excluded in the manner provided in S. 29 of the Negotiable Instruments Act the liability of executors of wills or guardians on promissory notes executed by them as such is personal though they may be acting for the benefit of the testator's or minor's estate in doing so. Similarly the executant of a promissory note does not escape from personal liability merely by stating that he executed the pro-note as a guardian. (*Krishnan, J.*) K. SUBBARAYUDU *v.* K. SUBBANNA. **85 I. C. 457=A. I. R. 1925 Mad. 371=47 M. L. J. 765.**

—S. 30—Discharge.

———*Omission to give notice of dishonour discharges the persons entitled to such a notice.*

It is provided by S. 30 that the drawer of a bill of exchange is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by, the drawer as hereinafter provided. A perusal of S. 106 of the Act leaves no doubt that the notice of dishonour should be given as soon as the bill is dishonoured. It is the duty of the holder to prove that due notice was given, and if not given, he was excused from doing so for any of the reasons specified in S. 98. The omission to give due notice of dishonour has the effect of discharging the persons who are entitled to such notice. (*Shadi Lal, C. J. and Agha Haidar, J.*) BAHADUR CHAND *v.* GULAB RAI. **116 I. C. 887=11 Lah. 34=A. I. R. 1929 Lah. 577.**

—S. 31—Dishonour of hundi.

The endorsers of a hundi can, if they choose, avail themselves of the provisions of S. 78 read with S. 82, Cl. (c), Negotiable Instruments Act, and sue the opposite party on the hundi which has not been honoured. But this does not prevent them from availing themselves of their right to sue for compensation under S. 32 and S. 117, Cl. (c). (*Aston, A.J.C.*) NARAINDAS & CO., *v.* CHANDIRAM, & CO. **107 I.C. 218=22 S.L.R. 305=A.I.R. 1928 Sind 86.**

—S. 31—Forged cheque.

———*Money cashed on forged cheque—Owner of*

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 31—Liability of drawee.

cheque book is not to bear loss unless gross negligence is proved.

Where all that was alleged against appellant the customers on the score of negligence was that they were negligent in the custody of their cheque book and their rubber stamps which were consequently used on their cheques.

Held : that it would not be sufficient to make appellants bear the loss which resulted from the forgery of a cheque stolen from their cheque book and the fraudulent use of their stamps, if the respondents Bankers cashed the forged cheque and have not been able to establish such negligence as would in law render appellants liable. In order to make the customer liable for the loss, the neglect on his part must be in or intimately connected with the transaction itself and must have been the proximate cause of the loss. (1909) 2 K. B. D. 1010. Foll. (1855) 5 H.L.C. 389. Foll. (*Heald and May Oung, JJ.*) AHMED MOOLLA DAWOOD *v*, S. R. M. M, C. T. PEREINAN CHETTY FIRM. **80 I.C. 261=3 Bur. L.J. 22= A.I.R. 1924 Rang. 264.**

—S. 31—Liability of drawee.

A drawee is not liable as such on a hundi till he has accepted the same. Where, therefore, a person is to be charged with liability, it must be shown that he has accepted that liability and the burden of proof is therefore on the holder to show that drawee had accepted the liability to pay the hundis on behalf of his firm. (*Mukerji and Bennet, JJ.*) BENARES BANK LIMITED, AGRA *v*. PIRYA DASS PITAM CHAND. **122 I.C, 406=A.I.R. 1930 All. 106,**

—S. 31—Payment through mistake.

Bank making payment through mistake in respect of cheque countermanded by drawer is not entitled to refund of amount from payee—Chambers *v*. Miller, 134 R. R. 479, Ref.; A.I.R. 1923 Mad. 17, Kelly *v* Solari, 60 R. R. 666 and 3 Q. B.D. 1877 ; 371, Dist. (*Zafar Ali and Dalip Singh, JJ.*) PUNJAB INDUSTRIAL AGENCY, LTD., KHAIBER PASS, DELHI *v*. MERCANTILE BANK OF INDIA, LTD,, CHANDNI-CHOWK, DELHI. **A.I.R. 1930 Lah. 852.**

—S. 32—Liability—Suit on.

———*Indent—Agreement to accept bills notwithstanding dispute.*

Where one of the clauses in the indent form provided " We hereby agree to purchase from you the undermentioned goods and authorise you or your correspondents to draw upon us at 30 days' sight with all relative shipping documents attached for payment. In case of need, seller's invoice to be taken in lieu of draft which we engage and bind ourselves to accept on presentation and pay at maturity notwithstanding any objection we may have regarding or on account of any variation whatever from the terms of the indent, such objection to be settled by arbitration as provided for." *Held* : It is clear that drafts must be accepted on presentation and paid at maturity in spite of any objection the indentors may have regarding or on account of any variation from the terms of the indent.

In the above case, a suit brought upon the accepted but unpaid bills of exchange is a suit governed by S. 32 and is not a suit for damages. (*Scott-Smith and Abdul Qadir, JJ.*) RADHA BIHARI *v*. G. B. ALEXANDER. **66 I.C. 43=2 Lah. 335= 118 P.L.R. 1921=A.I.R. 1922 Lah. 353.**

—S. 33—Acceptance.

Where a person against whom a bill of exchange is drawn by name, accepts the bill for or on behalf of a corporation of which he is a member there is no valid acceptance of the bill. (*Macleod, C.J. and Crump, J.*) IBRAHIM FAZILBHOY JOOMABHOY *v*. INTERNATIONAL BANKING CORPORATION. **87 I.C. 485= 27 Bom. L.R. 283=A.I.R. 1925 Bom. 252.**

—S. 35—Liability of endorser.

———*Promissory note—Endorser can prove his limited liability by oral evidence.*

Lobo, A. J. C.—It is open to the endorser of a negotiable instrument to prove that the endorsee orally agreed to recover the amount of the pro-note from the estate of the drawer only.

Rupchand Bilaram, A.J.C.—A bill or note is required by law to be in writing and so the supervening contracts thereon such as acceptance or endorsement. It, therefore, follows that the contracts of the immediate parties to them are subject to the ordinary rule as to written contracts. The contract, by an endorser of a bill or note, however, stands on a different footing. It is not fully expressed in writing on the document itself and certain terms are said to be affixed to it either by the Law Merchant or by statute. There is, therefore, more room for admission of parol evidence as to what is the contract represented by the transaction. Where the endorsement is silent, it undoubtedly raises a *prima facie* presumption of law that the liabilities, *inter se*, of successive endorsers are that every prior endorser must indemnify a subsequent one. But this is only a presumption and not an express term of the contract reduced to writing. And, therefore, the rules as to exclusion of parol evidence crystallized in S. 92, Indian Evidence Act, do not apply. As between immediate endorsers such presumption may, in the absence of any other well-recognized rule of law or statutory provision in that behalf, be rebutted by parol evidence : *Macdonald* v. *Whitfield*, (1883) 8 A.C. 733, Rel. on. (*Rupchand Bilaram and Lobo, A. J. C's.*) SUNDERJI GOURISHANKER *v*. ABIGAIL. **105 I.C. 747=22 S.L.R. 249= A.I.R. 1928 Sind 50.**

———Dishonour by the drawee is a condition precedent under S. 35 for the coming into existence of the liability of the endorser. (*Venkatasubba Rao and Srinivasa Ayyangar, JJ.*) KANDAPPA CHETTI *v*. THIRUPUTHI CHETTY. **86 I.C. 576=21 M.L.W. 210= A.I.R. 1925 Mad. 444.**

———The liability of an endorser of a promissory note arises out of the endorsement and not on the note. The cause of action against him cannot arise earlier than the indorsement. Payment of money by the maker and endorsed on the note and signed by him (the maker) saves limitation as against persons liable on the note and has nothing to do with persons liable on the endorsement. The extent and nature of the liability of endorser of note payable on demand is not governed by Section 35 of the Negotiable Instruments Act, 33 Mad. 34 Foll.

Where a note payable on demand has been endorsed it must be presented for payment within a reasonable time of the endorsement. If it is not presented, the endorsee is discharged. It should not be in the option of the endorsee by waiting for an unreasonable length of time to postpone the cause of action as he likes. Notice of dishonour is also necessary as a condition precedent to the liability of the endorser. (*Ramesam, J*) JAGANNADHA REDDIAR *v*. LAKSHMANA REDDIAR. **80 I.C, 932=35 M.L.T. 120= A.I.R. 1925 Mad. 132=47 M.L.J. 475.**

———The fact of the Bill of Exchange having been dishonoured and of its intimation to the endorser must be proved before the endorser is made liable under S. 35. (*Piggott and Gokul Prasad, JJ.*) SANEHI

NEGOTIABLE INSTRUMENTS ACT, (1881), S. 37—Liability as principal—Surety.

LAL *v.* ONKAR MAL. **59 I.C. 675=18 A.L.J. 981=2 U.P.L.R. (All.) 375.**

—S. 37—Liability as principal—Surety.

A bank which credits the customer wtth the amount of a cheque as soon as it is paid into his credit is usually in the position of a holder in due course of the cheque and collects the same not for the customer, but for itself.

The plaintiff, a bank, sued for recovery of certain amount on two hundis payable at sight, drawn by defendant 2 in favour of defendant 1, on a certain firm. They were endorsed to the bank by defendant 1, and were dishonoured by the drawee. Defendant 1 had a current account with the bank which was overdrawn ; the hundis were paid in reduction of the overdraft and defendant 1 was at once allowed to draw against the credit balance thus established. After the hundis were dishonoured, the bank debited defendant 1's account with that amount and gave notice of dishonour.

Held : that the bank was the holder in due course of the hundis. It did not matter that the amount of the hundis was carried to the current account. It could not be said that there was a discharge by accord and satisfaction. When the hundis were returned unpaid. The bank, as an account transaction, simply showed in the pass book that defendant 1 was liable to the extent of the dishonoured hundis. This did not mean that the bank gave up its rights in the hundis as against either of the defendants. Nor was there any discharge by merger. Defendant 2 was liable on the hundis as principal debtor, while defendant 1 was liable as surety for the debt. (*Addison and Agha Haidar, JJ.*) ALLAHABAD BANK LTD. *v.* RATTAN CHAND. **102 I.C. 801=8 Lah. 702=29 P.L.R. 142=A.I.R. 1927 Lah. 577.**

—S. 43—Consideration.

Where a cheque for a larger amount than was due was drawn the endorsee or the person in whose favour the cheque was drawn is entitled only to the actual amount due and nothing more. (*Kulwant Sahay, J.*) KISHEN BAHADUR *v.* SASSARAM LIME LTD. **80 I.C. 572=2 Pat. L.R. Civ. 54=A.I.R. 1924 Pat. 521.**

———Failure of consideration for pronote—Obligation to pay under, ceases. (*Pratt, J.*) MC. AYOOB *v.* SOMDAGER. **82 I.C. 789=1 Bur. L.J. 261=A. I. R. 1923 Rang. 127.**

—S. 45—Consideration.

Where a hundi has been drawn for the price of a number of bales at a certain sum per bale and only a part of the bales have been delivered, the consideration for the hundi can be pleaded to have failed with reference to all the undelivered bales as against the payee, a party who stands in immediate relation to the drawer. (*Phillips and Krishnan, JJ.*) ARUNACHALLAM CHETTIAR *v.* KRISHNA AYYAR, **90 I.C. 481=22 M.L.W. 265=1925 M.W.N. 324=A.I.R 1925 Mad. 1168=49 M.L J. 530.**

———A hundi was drawn for the price of a number of bales contracted to be sold by the drawee to the drawer. The vendee took delivery of only a portion of the bales. The vendor brought a suit on the hundi alleging that the vendee had broken the contract and that he was entitled to damages. The defendart pleaded failure of consideration for the hundi in respect of the undelivered bales and asserted that the contract had been broken by the plaintiff.

Held : that the question 'who committed to breach' should be considered without driving the parties to another suit and thereby multiplying litigation. In England it is open now to the parties to raise the question as to breach in suit on a bill by counter-claiming. The case should be dealt with as if it were one for damages for breach of contract. (*Phillips and Krishnan, JJ.*). ARUNACHALLAM CHETTIAR *v.* KRISHNA AYYAR. **90 I.C. 481=22 M.L.W. 265=1925 M.W.N, 324=A. I. R. 1925 Mad. 1168=49 M.L.J. 530.**

—S. 45—Loss of hundi.

———*Hundi payable at sight—Loss of, does not give a right to demand duplicate.*

Where a hundi is payable at sight, the holder is not as of right entitled to demand a duplicate under S. 45 (*a*). Moreover as it is payable at sight it cannot be said that it was lost before it was overdue. But a duplicate may be demanded on equitable principles where a bill is lost whether before or after maturity as the right to demand duplicate is a part of the mercantile laws of the countries. (*Scott-Smith, J.*) FIRM UDHO RAM-CHANDI RAM *v.* FIRM HEM RAJ TEJ-BHAN. **72 I.C. 777=A.I.R. 1924 Lah. 198.**

—S. 46—Delivery.

Property in a currency note passes by mere delivery: 7 M. H. C. R 233 and 40 Bom. 186, Foll. (*Curgenven J.*) K. SRINIVASA MOORTHI *v.* NARASIMHALU NAIDU. **104 I.C. 719=50 Mad. 916=26 M.L,W. 168=39 M.L.T. 18=1927 M.W.N. 692=9 A.I.Cr.R. 38=28 Cr.L.J. 879=A.I.R. 1927 Mad. 797=53 M.L.J. 309.**

———Where the plaintiff sent a cheque in a letter by ordinary post endorsed in favour of one T. *Held* the plaintiff still had an interest left in him in the cheque, as there was no delivery within the meaning of S. 46, (*Kajiji, J.*) JAGJIVANDAS *v.* NAGAR CENTRAL BANK. **93 I.C. 619=50 Bom. 118=28 Bom.L.R. 226=A,I.R. 1926 Bom. 262.**

———It is elementary law that in order to make the property in a bill pass it is not sufficient to indorse it ; it must be delivered to the indorsee. Such delivery, as enacted in S. 46 of the Negotiable Instrument Act, may be actual or constructive. (*Mulla, J.*) THORAPPA DEVANAPPA *v.* UMEDMALJI. **87 I.C. 226=25 Bom. L.R. 604=A.I.R. 1924 Bom. 205.**

———*Indorsement and delivery for collection does not pass property in the bill.*

Though the indorsement of a negotiable instrument and delivery transfer to the indorsees the property therein yet if the instrument is delivered conditionally or for a special purpose only and not for the purpose of transferring absolutely the property therein, the property does not pass to the indorsee. (*Martineau, J.*) PUNJAB NATIONAL BANK, LTD. LAHORE *v.* COTTON FACTORY KNOWN AS A BAL KRISHNA DASS DURGA DUTTA. **79 I.C. 461=6 L.L.J. 230=A.I.R. 1924 Lah. 640.**

—S. 46—Interpretation.

The words "as between such parties and any holder of the instrument other than a holder in due course" mean "as between the maker and the payee or the endorser and the endorsee or the endorsee and any holder other than a holder in due course or as between any one of such parties and any other." (*Boys and Ashworth, JJ.*) BHOGI RAM *v.* KISHORI LAL. **115 I.C. 771=50 All. 754=26 A.L.J. 696=A.I.R. 1928 All. 289.**

———The liability in relation to a promissory note, or negotiable instrument, attaches by or from delivery, and S. 46 of the Negotiable Instruments Act provides that as between the parties to an instrument (that means to say, the immediate parties) it may be shown that the instrument was delivered conditionally or for

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a special purpose only, and not for the purpose of transferring absolutely the property therein. Similarly it may be shown that the instrument was delivered conditionally, that is to say, as a collateral undertaking, given to the creditor, to be enforced only in the event of the debtor failing to discharge some contemporaneous undertaking. There is no difference in substance but only in illustration and application between the provision in S. 46 of the Negotiable Instruments Act, and proviso 3 to S. 92 of the Evidence Act. (*Walsh, Ag.C.J. and Banerji, J.*) SHEO PRASAD RAM PRASAD *v.* GOVIND PRASAD. **100 I.C. 332=25 A.L.J. 305=49 All. 464=A.I.R. 1927 All. 292.**

—S. 46—Scope.

Pronote could be shown to be given as security. (*Phillips and Thiruvenkatachariar, JJ.*) RAMANANDAN *v.* GUDNU. **113 I.C. 456=1928 M.W.N.680=A.I.R. 1928 Mad. 1238.**

—S. 49—Bill of Exchange.

—An instrument not addressed to a drawee can become a bill of exchange if a third person endorses an acceptance which is not inconsistent with the address and that the acceptor might be deemed to have admitted himself to be the party addressed. The endorsee thus becomes liable under the instrument and is estopped from contending that he is not the drawee. *Lloyd* v. *John Edward Oliver*, (1852) 18 Q. B. 471 and *Gray* v. *Milner*, (1819) 8 Taunt 739, Ref. *Davis* v. *Henry John Clarke* (1844) 6 Q.B. 16, and *Steele* v. *M'Kinlay*, (1880) 5 A.C. 754 : Dist. (*Graham and Mitter, JJ.*) JOGESHCHANDRA DHAR *v.* MAHOMMAD IBRAHIM. **A.I.R. 1930 Cal. 697.**

—S. 50—Endorsement.

———*Unrestricted endorsement of cheque—Endorser is not entitled to sue.*

Where *A* issues a cheque in favour of *B* who endorses it in favour of *C*, who again, in his turn, endorses the said cheque in favour of *D* by an unrestricted endorsement, a suit brought by *C* against *A* to recover the amount on the cheque being dishonoured is liable to be dismissed. (*Bhide, J.*) GHULAM MOHIUDDIN *v.* RAM DITTA MAL. **122 I.C. 101=A.I.R. 1930 Lah. 248.**

———A Hundi drawn in favour of a payee or bearer in the first instance but endorsed by the payee to a named person, ceases to be a hundi payable to bearer. It is payable only to the named person.

S. 50 is not limited to negotiable instruments payable to order. It applies to any negotiable instrument whether it is payable in the first instance to order or to bearer. The illustrations to the section make it clear that endorsements made on instruments payable to bearer can have a restrictive effect upon its negotiability. (*Shah, Ag. C. J. and Kincaid, J.*) F. FORBES CAMPBELL & CO. *v.* OFFICIAL ASSIGNEE. **86 I.C. 118=27 Bom. L.R. 34=A.I.R. 1925 Bom. 173.**

—S. 50—Forged Endorsement.

———*Forged endorsement confers no right on endorsee.*

A forged endorsement is a nullity and conveys no title to the endorsee. It is as much a nullity as a forged cheque or a forged hundi provided there has been no negligence on the ' part of the true owner in allowing the instrument to come into the hands of the forger. *Obiter dicta* of Stephen, J. in 32 Cal. 799 Diss. from. 36 Cal. 239 ; 28 All. 428 and 24 Bom. 65 Foll.

A holder under such a forged endorsement is not a holder in due course. A Bank takes a risk in accepting as security for an advance a negotiable security payable to order because it may always be met with a claim by the true owner that the endorsement is forged. (*Kemp, A. J. C.*) KODUMAL KALUMAL *v.* KARACHI BANK LTD. **82 I.C. 730=15 S.L.R. 93=A.I.R. 1921 Sind 172.**

—S. 51—Negotiation.

———*Endorsement and negotiation—Distinction.*

The first defendant executed the note sued on in favour of the second defendant who endorsed to defendants 3, 4 and 5. The 3rd defendant endorsed it in blank and handed the note to defendants 4 and 5 and they endorsed it in blank, received the sum due on the note and handed the note to the plaintiff.

Held, that there is no endorsement by 3rd defendant in favour of defendants 4 and 5 ; but there is only a blank endorsement by 3rd defendant. There is a difference between endorsement and negotiation and the handing over of the note by the 3rd defendant to defendants 4 and 5 with the object that the money on the note may be collected from plaintiff in accordance with the object with which the note was originally endorsed in favour of defendants 3, 4 and 5 would not amount to negotiation of the note in contravention of the provisions of S. 51 of the Negotiable Instruments Act.

S. 50 of the Negotiable Instruments Act requires that the restriction or exclusion of the right of further endorsement must be by express words.

S. 51 of the Negotiable Instruments Act, does not require that the endorsement should be at one and the same time. Its effect is only to prevent one of two or more endorsees negotiating the note and its requirements are satisfied if the endorsement is made by the payees or endorsees.

If for the purpose of collection the 3rd defendant first endorses the note and gave it to 4th and 5th defendants in order to enable them to add their signatures and then raise money, it cannot be said that the provisions of S. 51 are contravened. (*Kumaraswami Sastri and Devadoss, JJ.*) ANNAMALAI CHETTY *v.* MUTHIAH CHETTY. **70 I.C. 590=1922 M.W.N. 263=A.I.R. 1922 Mad. 210.**

—S. 57—Transfer of pro-note.

———*Transfer without endorsement does not convey any interest.*

A pro-note was executed in favour of the executor, who was subsequently discharged by a decree of Court and the estate vested in the legatee. The pronote was not endorsed by the executor to the legatee who passed it to plaintiff.

Held, the legatee had not obtained any interest in the pro-note which he could transfer to plaintiff, in the absence of an endorsement by the executor. (*Ayling and Odgers, JJ.*) KUPPUSWAMI *v.* NARAYANASWAMI. **70 I.C. 670=17 M.L.W. 676=32 M.L.T. 192=1923 M.W.N. 332=A.I.R. 1923 Mad. 593=44 M.L.J. 510.**

—S. 58—Forged endorsement.

———*Forged endorsement is nullity—Subsequent holder is not holder in due course.*

A forged endorsement is a nullity and consequently there is no question of a subsequent holder being a holder in due course : 24 Bom. 65 ; A. I. R. 1924 Bom. 205 ; 36 Cal. 239 ; and 28 All. 428 ; Foll.

Plaintiffs entrusted three Bombay Improvement Trust debentures to defendant 1, a broker in the Share Bazaar, for recovering interest. Defendant 1 forged plaintiffs' signatures, endorsed them in favour of defendant 2, a bank, and handed them over to the bank to secure advances. Subsequently two were

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renewed in plaintiffs' name, bnt defendant 1 forged plaintiffs' signatures on them and endorsed them in favour of the bank and gave them to the bank. The third one was renewed in the name of defendant 1. He endorsed it over to the plaintiffs and subsequently forged plaintiffs' signatures, and endorsed it in favour of himself and then in favour of defendant 2 to whom it was handed over. Defendant 1 obtained a loan from defendant 3 to pay off defendant 2 who endorsed all the debentures in favour of defendant 3 and handed them over to defendant 3 as security for the loan advanced. The plaintiffs sued the defendants to recover the debentures or their value.

Held : that the new documents held by defendant 3 contained in themselves forged endorsements and it was through these forged endorsements that title of defendant 3 was derived. The plaintiffs were therefore entitled to recover the debentures. (*Marten, C. J. and Blackwell, J.*) MERCANTILE BANK *v.* D'SILVA.

112 I.C. 824=52 Bom. 810=30 Bom. L. R. 1225= A. I. R. 1928 Bom. 436.

——Fourteen debentures issued by the Bombay Port Trust were entrusted by plaintiff to defendant 1. Defendant 1 forged the plaintiff's signature on the debentures and endorsed them in favour of the bank, defendant 2, as security for the loan advanced to him. The bank got the debentures renewed for the original amounts and new debentures were issued in their name. In the new debentures there was a distinct reference to renewal. Defendant 1 took a loan from defendant 5 and paid off defendant 2 who endorsed the new debentures in favour of defendant 5 who retained them as security for the loan. The plaintiff sued to recover the debentures or their value from the defendants.

Held, that defendant 5 was entitled to retain these documents. There is a distinction between a promissory-note full of endorsements, and a promissory-note which is a clean-document. A person in the position of defendant 5 is not obliged before he becomes the holder of the new debentures to enquire into the title of the old debentures, nor to call for their production, and search through all the old debentures. (*Marten, C. J., and Blackwell, J.*) MERCANTILE BANK OF INDIA *v.* EMCAEIRO, **114 I.C. 389=30 Bom.L.R,1222= 52 Bom. 807=A.I.R. 1928 Bom. 434.**

——*Forged endorsement on debentures of Bombay Improvement Trust—Endorsee consolidating old debentures and getting new ones—New ones endorsed to third party* bona fide—*Original owner is not entitled to claim the new debentures from third party.*

The plaintiff was the owner of thirty-one debentures of Bombay Improvement Trust which he entrusted to defendant 1 who was a sub-broker in the Share Bazar in Bombay, to collect interest as it fell due. Defendant 1 forged plaintiff's signatures on the debentures and endorsed them in his own favour. Defendant 1 endorsed them subsequently in favour of defendant 2, a bank, as security for the advances he took from them. Defendant 2 sent the debentures to the Bombay Improvement Trust for consolidation and renewal, and got twelve new debentures for different amounts in their own name. Defendant 1 borrowed a loan from another bank defendant 3 and paid off defendant 2 who endorsed the twelve new debentures in favour of defendant 3. Defendant 3 retained the debentures as security for the loan advanced to defendant 1. The plaintiff had his suspicion aroused as to the fraud by defendant 1 and filed a

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suit against the defendants to recover the debentures or their value.

Held : that the debentures were promissory-notes and, therefore, negotiable instruments, and that a forged endorsement being no endorsement all subsequent endorsements would be inoperative and invalid, but that the effect of the renewal of the debentures was that the earlier contracts were determined and there was a new contract to pay the consolidated sum, and that defendant 3 were holders, in due course of the new debentures and they being a distinct document from the old debentures, they were in no way concerned with any invalidity of the old debentures, nor with any invalidity affecting the surrender by defendant 2 to the Improvement Trust of the old debentures : 24 Bom, 65, Diss. from. : *Lee* v. *Zaqury*, (1817) 8 Taunt 114, Dist. (*Marten, C. J. and Blackwell, J.*) MERCANTILE BANK OF INDIA LTD. *v. A. J.* MASCARENHAS. **114 I.C. 383=52 Bom. 792= 30 Bom. L.R. 1210=A.I.R. 1928 Bom. 407.**

——*Payment made under forged endorsement—Holder and drawee are both liable.*

If a party primarily liable on a negotiable instrument pays the amount thereof to a wrong person, who holds it under a forged endorsement, he remains liable to the true owner. The only exception to this is where the payee's indorsement on a cheque payable to order is forged. In such a case under S. 58, Negotiable Instruments Act, 1881, the drawee is discharged if he pays the amount in due course. No holder of a negotiable instrument, though he may be a holder in due course, can acquire a title to the instrument through a forged endorsement. Section 58, Negotiable Instruments Act, which protected a holder in due course where a negotiable instrument has been obtained by means of an offence, does not apply to a case of forgery. (24 Bom. 65; 8 All. 428 and 36 Cal. 239, *Ref.*) (*Mulla, J.*) THORAPPA DEVANAPPA *v.* UMEDMALJI. **87 I.C. 226=25 Bom. L. R. 604= A.I.R. 1924 Bom. 205.**

——*Title cannot be claimed through forged endorsement.*

No person can claim title to any negotiable instrument through a forged endorsement except in cases mentioned in S. 85 of the Negotiable Instruments Act. The possession of the person with a defective title is different from person that has no title at all. The endorsements through which the holder in due course can claim must be genuine. Though the pledgee may be ignorant of the fact that the endorsements had been forged still he takes the pledge at his peril and therefore acquires no title whatever. (*Kennedy, J. C. and Raymond, A. J. C.*) KARACHI BANK *v.* KODUMAL KALUMAL. **82 I.C. 998=A.I.R. 1923 Sind 54.**

—S. 58—Obtaining by unlawful means.

——*Negotiable Instrument obtained by fraud and endorsed to holder—Holder has to prove that he is holder for value* bona fide.

Under S. 58, when a negotiable instrument has been obtained from any maker by fraud or for an unlawful consideration, the ordinary presumption that the holder is a holder in due course is rebutted and the case comes under the proviso to S. 118 (g) and the burden of proving that the holder is a holder in due course lies upon the holder. As required by S. 9, the holder, in order to prove that he is a holder in due course, has not only to show that he is a holder for value but further he has to show that he became the holder of the instrument before it became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he

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derived his title. (*Phillips and Thiruvenkatachariar, JJ.*) RAMANANDAN *v.* GUNDU.

113 I.C. 456=1928 M.W.N. 680= A.I.R. 1928 Mad. 1238.

———A promissory note cannot be said to have been obtained from the holder by means of an offence or fraud within the meaning of S. 58, by reason of its endorsement being antedated. (*Ramesam, J.*) MALLAYA GOUNDAN *v.* PALANI GOUNDAN.

98 I.C. 308=1926 M.W.N. 726= A.I.R. 1926 Mad. 1154.

—S. 58—Scope.

Blackwell, J.—S. 58 does not deal exhaustively with all possible offences that may arise in connexion with the obtaining of an instrument. Forgery is one of them. (*Marten, C. J. and Blackwell, J.*) MERCANTILE BANK *v.* D'SILVA. **112 I.C. 824= 52 Bom. 810=30 Bom. L.R. 1225= A.I.R. 1928 Bom. 436.**

—S. 58—Conditional Discharge.

A promissory note given for reducing liability only operates as a conditional discharge for the liability; 10 I.C. 118; 26 Mad. 526 and A.I.R. 1926 Mad. 792 Ref. (*Kumaraswami Sastri and Walsh, JJ.*) IMPERIAL BANK OF INDIA *v.* V. P. AVANASI CHETTIAR. **A.I.R. 1930 Mad. 874.**

—S. 59—Holder for value.

The view that a *bona fide* holder for value of a promote payable on demand cannot be affected by any previous demand for payment of which he had no notice, is warranted by S. 59. *Glasscock* v. *Balls*, 24 Q.B.D. 13, Rel. on. (*Phillips and Thiruvenkatachariar, JJ.*) RAMANADAN CHETTIAR *v.* GUNDU AYYAR. **113 I.C. 456=1928 M.W.N. 680= A.I.R. 1928 Mad. 1238.**

—S. 63 —Application of.

A Hundi was drawn by the firm of M in favour of the firm of G who sent it to the firm of N with instructions to realise the amount and place it to the credit of G; N sent it to his commission agents R to realise the amount from the drawees who saw it on 22-6-1917. The drawees kept it with them for 7 days and returned it to the commission agent R. R returned it to the firm of N who got it on 5-7-1917, possibly owing to the delays in the post. The firm of N returned it to the firm of G the same day. In the meanwhile the drawers, the firm of M failed on 4-7-1917 and the firm of G were unable to realise their amount. They sued the firm of N. and others, claiming that N should be treated as having received the money though in fact they had not. The lower Courts decreed the claim holding Section 63 read with Section 83 applicable.

Held, that Section 63 read with Section 83 does not apply to a Hundi payable on demand. Under Section 61, it is only a bill payable after sight which requires to be presented to the drawee for acceptance and it is only to such a bill that Section 83 applies. (*Daniels, J.*) NAND LAL *v.* (FIRM) GULAB RAI. **71 I.C. 610=A.I.R. 1923 All. 345.**

—S. 64—Presentment.

Where consequences are provided for as following from the non-presentment, it is not open to the Court to hold that besides the consequences provided for by the law, other consequences, not mentioned by the law, are also to follow.

Under S. 64 the result of non-presentment of hundis for payment is not exemption of the acceptor from liability but the exemption of other parties to the hundis only. The word "other" has been used to show that there is a difference between S. 64 and

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S. 68—Interpretation.

Ss. 61 and 62 where the words used are "no party." The section therefore means that the parties who are mentioned in the section may be liable but other parties to the documents are not to be liable. The exception to S. 64 cannot be read as controlling the plain language of the main section, but must be read as more or less an independent rule of law. The acceptor of a hundi therefore remains liable under it in spite of the fact that it was not presented for payment: (*Mukerji and Bennet, JJ.*) BENARES BANK LIMITED *v.* HORMUSJI PESTONJI. **1930 A.L.J. 818= A.I.R. 1930 All. 648.**

———Though the parties to a promissory note (payable three months after date) other than the maker are discharged from their liability by reason of default in making presentment for payment, the maker is nevertheless liable except when the note is payable at a specified place: 30 Mad. 172; 21 All. 450 and 32 Bom. 247, Rel. on. 39 All. 364, Expl. and Dist. (*Shadi Lal, C. J. and Bhide, J.*) GHANIA LAL *v.* KARAM CHAND. **115 I.C. 860=10 Lah. 755=31 P.L.R. 20= A.I.R. 1929 Lah. 240.**

———Where a hundi is not presented for payment and the drawer withdraws the money after many days, the burden of proof lies heavily on the payee to prove that the drawer did not suffer any loss, and the circumstances will be very exceptional in which he could prove that the drawer could not possibly have suffered any damage and burden is certainly not discharged by the oral admission of the defendant drawer that sometime or other subsequently he got back his money. (*Boys and Ashworth, JJ.*) BHIKKI MAL *v.* RAGHUBIR SINGH. **88 I.C. 915= 23 A.L.J. 861=6 L.R.A. Civ. 500= A.I.R. 1925 All. 811.**

———The loss of a bill or note does not excuse non-presentment. (*Scott-Smith, J.*) FIRM UDHO RAMCHANDI RAM *v.* FIRM HEM RAJ TEJ BHAN. **72 I.C. 777=A.I.R. 1924 Lah. 198.**

Where on appeal the point was taken, that as the *hundi* had not been presented the provisions of S. 64 of the Negotiable Instruments Act barred the suit. *Held*: that the provisions of S. 76, Clause (*d*) render presentation unnecessary in this case. According to that section no presentation for payment is necessary "as against the drawer, if the drawer could not suffer damage from the want of such presentation." If the drawer and the drawee were the same, both of them know when the *hundi* was executed, when it is payable, and no question of damage can arise. (*Ryves and Gokul Prasad, JJ.*) PACHKAURI LAL *v.* MUL CHAND. **66 I.C. 503=44 All. 554=20 A.L.J. 437= A.I.R. 1922 All. 279.**

———*Hundi.*

Presentment for payment is necessary to charge the acceptors of a Hundi. The words "Other parties" in S. 64 mean parties other than the holder. 21 All. 450; 32 Bom. 247, not Foll. (*Daniels, A.J.C.*) THE OUDH COMMERCIAL BANK LTD., *v.* GUR DIN. **59 I.C. 604=28 O.C. 364.**

—S. 66—Presentment.

———Under S. 66, Negotiable Instruments Act, a bill of exchange made payable at a specified period after date must be presented for payment at maturity, and the want of presentment exempts the endorser. (*Mukerji and Bennet, JJ.*) BENARES BANK LTD., AGRA *v.* PIRYA DAS PITAM CHAND. **122 I.C. 406= A.I.R. 1930 All. 106.**

—S. 68—Interpretation.

———"*Place*" *includes* "*places*".

The word "place" must be construed as including

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"places" as it would be anomalous to require presentment, if one place is mentioned, but none, if two places are mentioned. If more than one place is mentioned there must be presentment at one or other of those places. (*Phillips and Ramesam, JJ.*) CHEGGAMMULL *v.* MANICKA MUDALIAR. **94 I.C. 384=A.I.R. 1926 Mad. 792=50 M.L.J. 242.**

—S. 68—Presentment.

No presentment is valid unless it is made after the bill had reached maturity. (*Lindsay and Kanhaiya Lal, JJ.*) (FIRM) JHANDU LAL MITHU LAL *v.* MT. WILAYATI BEGUM. **87 I.C. 488=47 All. 572=23 A.L.J. 349=6 L.R.A. Civ. 310=A.I.R. 1925 All. 442.**

—S. 76—Application.

Section 76 (d) will apply to a case where the drawer has no funds with the drawee at the time the bill is being drawn or to a case where the drawer has no reasonable expectation that the drawee will accept for his accommodation. (*Lindsay and Kanhaiya Lal, JJ.*) GENDA LAL *v.* BAL KISHAN. **70 I. C. 596=A. I. R. 1922 All. 422.**

—S. 76—Damage.

Where the drawer of a bill of exchange dishonestly denies payment of consideration and pleads that the endorsements were either forgeries or made in collusion with the payee in order to defraud him, he cannot plead that due to the want of presentation of the bill to the drawee, he (the drawer) has suffered any damage. Hence in such a case the holder in due course who sues on the bill and who has not presented the bill to the drawee need not prove that the drawer did not suffer any damage due to the non-presentation. (*Kennedy, J. C. and Rupchand Bilaram, A. J. C.*) BHAWANJI NARSI *v.* ASSAM PITAMBERDAS. **86 I. C. 357=19 S. L. R. 12=A.I.R. 1925 Sind 241.**

—S. 76—Necessity of presentment.

Under the provisions of S. 76, Cl. (d) the presentation on the exact date of the maturity of the hundi is not necessary when the drawer and the drawee are one and the same person, as in such a case no question of damage arises on account of the non-presentation on the due date: A. I. R. 1922 All. 279, Foll. (*Shadi Lal, C. J. and Agha Haider, J.*) SHANKAR DAS *v.* DELTOO RAM IDAN. **99 I. C. 875=8 L.L.J. 604=28 P.L.R. 24=A.I.R. 1927 Lah. 72.**

——When the drawer and the drawee of a hundi are the same person, no presentation on due date is necessary, as, from the nature of the case, the drawer cannot suffer damage from the want of such presentation and thus S. 76, Cl. (d), of the Negotiable Instruments Act applies. 45 All. 554, Foll.

It is not necessary for the plaintifls to make a specific reference in their pleas to S. 76 (d). (*Campbell and Zafar Ali, JJ.*) FIRM BUDHU MAL *v.* GOKUL CHAND. **92 I. C. 1015=7 Lah. 113=8 L.L.J. 3=27 P. L. R. 75=A.I.R. 1926 Lah. 328.**

——Even a parol promise on the part of the endorser to pay the note is sufficient to constitute an engagement to pay notwithstanding non-presentment. (*Lindsay and Kanhaiya Lal, JJ.*) (FIRM) JHANDU LAL MITHU LAL *v.* MT. WILAYAI BEGUM. **87 I. C. 488=47 All. 572=23 A. L. J. 349=6 L. R.A. Civ. 310=A.I.R. 1925 All. 442.**

——Hundi lost—Duplicate not supplied—No presentment is necessary. (*Scott-Smith, J.*) FIRM UDHO RAM-CHANDI RAM *v.* FIRM HEM RAJ TEJ BHAN. **72 I. C. 777=A. I. R. 1924 Lah. 198.**

—S. 78—Suit on pro-note.

——*Suit by a beneficiary of a promissory note joining ostensible holder as party is maintainable if it can be proved that ostensible holder is not real holder.*

Section 78 does not debar the real beneficiary under the promissory note from suing on the basis of the note if he can give a discharge to the maker of the promissory note. The object of S. 78 is to secure a valid discharge to the maker of the note. If the person who is ostensibly the holder of the promissory note is made a party to the suit and in his presence it is alleged that the plaintiff is the real beneficiary and that the ostensible holder was not the real holder of the instrument, and he can prove his allegation by evidence or by the admission of the ostensible holder of the instrument, there is no reason why such a suit, should not be maintainable: A. I. R. 1928 Cal. 148, Rel. on. 30 Mad. 88 (F. B.), A. I. R. 1922 All. 70, not Foll. (*Kulwant Sahay, J.*) SARJUG SINGH *v.* DEOSARAN. **123 I.C. 395=11 P.L.T. 255=A.I.R. 1930 Pat. 313.**

——A firm is not a person; it is not an entity; it is merely a collective name for the individuals who are members of the partnership. Therefore, a suit by a firm on a pro-note in favour of one of the partners is maintainable: A. I. R. 1924 Cal. 74 and (English cases), Rel. on. (*B. B. Ghosh and Roy, JJ.*) BROJO LAL SAHA BANIKYA *v.* BUDH NATH PYARI LAL DAS. **105 I.C. 549=55 Cal. 551=A.I.R. 1928 Cal. 148.**

——Section 78 does not prohibit any person other than the holder to bring a suit, if that person is the true owner: A.I.R. 1918 P. C. 146, Dist.; 30 Mad. 88 (F. B.), Dist. and Diss from.: A.I.R. 1922 All. 70 not Foll. (*B. B. Ghosh and Roy, JJ.*) BROJO LAL SAHA *v.* BUDH NATH PYARI LAL. **105 I.C. 549=55 Cal. 551=A.I.R. 1928 Cal. 148.**

——Promissory note in name of benamidar—Beneficial owner cannot sue. 21 Mad. 391, dissented. 28 Mad. 205, followed. 15 A.L.J. 695 followed. (*Ryves and Gokul Prasad, JJ.*) REOTI LAL *v.* MANNA KUNWAR. **65 I.C. 785=44 All. 290=20 A. L.J. 126=A.I.R. 1922 All. 70.**

—S. 80—Interest.

——*No stipulation for interest—No demand made—Interest to be allowed at 6 per cent. from date of service of summons.*

Interest on those instruments to which S. 80 applies is payable from the date of execution, or from maturity or from presentation or from demand or from service of summons according to the circumstances of each case. Where the promissory note contained no stipulation for interest and no demand was made prior to suit, *held*, that interest at 6 per cent. should be calculated from the date of service of summons. (*Lord Williams, J.*) PREM LALL SEIN *v.* RADHA BULLAV KANKRA. **34 C.W.N. 779.**

——Pro-note payable on demand—No place fixed for payment—Interest is payable at 6 per cent. from the date of the note. Case-law considered. (*Marten, C. J., Crump and Blackwell, JJ.*) GANPAT *v.* SOPANA. **107 I.C. 257=52 Bom. 88=30 Bom. L.R. 1=A.I.R. 1928 Bom. 35. (F.B.),**

——The liability on a promissory note payable on demand arises from the date of the note from which date the time of limitation begins to run and not from the date on which a demand is made for payment. Where therefore such a note is silent as to interest, interest is claimable under S. 80. Negotiable Instruments Act, at 6 per cent. from the date of the note A. I. R. 1926 Bom. 241, Foll.; 23 Mad. 18, Diss from. (*Tekchand, J.*) KHURSHID HAJ *v.* RAMDITTA MAL. **107 I.C. 753=A.I.R. 1928 Lah. 665.**

——Where the document was on the face of it

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merely an acknowledgment that the defendant's father had taken a certain sum of money from the plaintiff and that it was debited against him in the plaintiff's account-book.

Held : that interest could not be allowed under S. 80. (*Boys and Kendall, JJ.*) GULAB SHANKAR *v.* MULCHAND NIMICHAND. **101 I.C. 57 = A.I.R. 1927 All. 444.**

———The liability on a promissory note payable on demand arises from the date of the note and not from the date on which a demand is made for payment, and therefore under the provisions of S. 80 interest runs from the date of the note: 23 Mad. 18, Dissented from. (*Macleod, C. J. and Coyajee, J.*) FRAMROZ *v.* MD. ESSA. **94 I. C. 21 = 50 Bom. 266 = 28 Bom. L. R. 141 = A. I. R. 1926 Bom. 241.**

—— Where the pro-note did not provide for the payment of any interest, *Held* : The plaintiff could not recover interest more than 6 per cent. per annum under S. 80 ; the order of the Lower Court awarding interest at a higher rate must, therefore, be discharged. (*Kanhaiya Lal, J. C.*) KANHAIYA *v.* AZIM ULLAH. **25 O. C. 69 = A. I. R. 1922 Oudh 122.**

———Where there is no stipulation in a promissory note for the payment of interest, the Court can allow only 6 per cent. interest. (*Coutts and Macpherson, JJ.*) SAMARENDRA NARAIN SINGH CHOUDHRY *v.* MAHADEO RAUT. **63 I. C. 296. (Pat.)**

—S. 81—Material alteration.

———*Memorandum of due date made on a Bill of Exchange and when time for payment extended fresh entry made—No material alteration—Fresh stamp not necessary.*

It does not follow, that because a writing appears on the paper on which the bill is drawn, therefore, it becomes a part of the bill and constitutes a material alteration if at variance with the terms of the bill. Where after calculating the due date a memorandum is made in one corner of the bill of due date and when time for payment is extended the original memorandum is struck and new date is put, such memorandum does not constitute material alteration, because such dates entered in the corner of the bill do not become part of the bills which still remain as they were drawn payable at so many days after sight. Therefore no fresh stamp is necessary when such dates are entered in the bills. (*Macleod, C. J. and Coyajee, J.*) COX & COMPANY *v.* H. PESTONJI AND COMPANY. **99 I. C. 489 = 50 Bom. 656 = 28 Bom. L. R. 1264 = A. I. R. 1927 Bom. 13.**

—S. 82—Discharge by Cancellation.

When on the due date acceptor of a bill of exchange asks for further time, and the holder gives him further time, the bill is not cancelled, nor is the liability of the acceptor discharged : *Reed v. Deere*, (1827) 7 B. & C. 261 Dist, (*Macleod, C. J. and Coyajee, J.*) COX & COMPANY *v.* H. PESTONJI & COMPANY. **99 I. C. 489 = 50 Bom. 656 = 28 Bom. L. R. 1264 = A. I. R. 1927 Bom. 13.**

—S. 82—Discharge by Payment.

Payment to endorsee's agent effects discharge. (*Zafar Ali and Jailal, JJ.*) RAGHUNATH RAI *v.* RADHA KISHAN PANNALAL. **119 I.C. 759 = A.I.R. 1929 Lah. 634.**

—S. 82—Discharge by Release.

A fresh agreement between the drawer and the holder for value of a bill of exchange does not release the acceptor of the first bill from liability on foot of the first bill : 7 Cal. 256 and *David Torrance* v. *Bank of British North America*, (1873) L.R. 246, Rel. on. (*Dalal and Pullan, JJ.*) PUNJAB NATIONAL BANK.

NEGOTIABLE INSTRUMENTS ACT, (1881)—S. 87—Material alteration.

v. TAJAMMAL HUSAIN. **100 I.C. 341 = 49 All. 257 = 25 A.L.J. 102 = A.I.R. 1927 All. 236.**

—S. 85—Cheque payable to order.

Under S. 85 protection is given to the drawee and also drawer if a cheque payable to order purports to be endorsed by or on behalf of the payee or endorsee and if drawee makes the payment in due course. (*Kajiji, J.*) JAGJIVANDAS *v.* NAGAR CENTRAL BANK. **93 I.C. 619 = 50 Bom. 118 = 28 Bom.L.R. 226 = A.I.R. 1926 Bom. 262.**

—S. 87—Application of.

S. 87 has reference to an alteration after execution and not anything done at the time of the execution. Where a promissory note was alleged to be executed by two persons but it was found that the signature of one of the executants was forged,

Held : that S. 87 did not apply. (*Devadoss, J.*) MADAN PILLAI *v.* ATHINARAYANA PILLAI. **87 I.C. 48 = 21 M.L.W. 532 = A.I.R. 1925 Mad. 929.**

—S. 87—Forged Signature.

Where a pro-note purported to be executed by two persons, but it was found that one of the executants had forged the signature of the other, and the creditor was aware of this fact,

Held : there was material alteration and creditor could not succeed on the note ; 26 M.L.J. 257 and C.R P. 601 of 1912 (Mad.), Foll.; A.I.R. 1925 Mad.929 Not Foll. (*Wallace, J.*) MOHIDEEN PILLAI *v,* JAMAL MD. JAMALUDIN. **112 I.C. 404 = 1928 M.W.N. 591 = A.I.R 1928 Mad. 1092.**

—S. 87—Material alteration.

Addition of two attesting witnesses made subsequent to the execution of an improperly stamped promissory note in order to convert it into bond and thereby opening up the possibility of suing upon it on payment of penalty is tantamount to material alteration which invalidates the instrument and destroys the right of action on it:38 Mad. 746, Ref. 43 Mad. 703, Dist. (*Hilton, J.*) MANGAL DAS *v.* JASVANT SINGH. **A.I.R. 1930 Lah. 959.**

———*Acceptor asking for extension of time for payment—Time extended and remarks made to that effect on the bill—The original bill is not discharged and the remarks do not amount to material alteration, nor a second instrument chargeable with fresh stamp.* (86 *I.C* 115·; *A.I.R.* 1925 *Bom.* 187 *and* 49 *Bom*, 351 *over ruled.*)

The appellants, merchants in Bombay, imported goods from some firms in England. In ordinary course, these sellers drew drafts on the appellants, with shipping documents attached and discounted them with the respondents' bank in London. The respondents then sent the drafts to their Bombay branch to be presented to the appellants for acceptance and for subsequent collection. On account of a fire accident in the Bombay piece goods market, the appellants requested the sellers to extend the period of payment. The sellers wrote to the respondents' London office requesting accordingly that the best arrangement possible should be made with the bank to "extend duration" of all their drafts for two or three months. The London office, having assented to the suggestion made by the sellers, instructed their Bombay branch accordingly to "extend all outstanding bills" for various periods.

In ordinary course, the clerks at the respondents' Bombay branch affixed the necessary revenue stamps to drafts before presenting them for acceptance and also, stamped the word "due" on the top right-hand corner of the draft and after acceptance added to it the date for presenting the bill for payment according

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to its usance with the days of grace added. When the duration of a bill was extended, they usually struck through this marginal date and substituted the extended date. It was contended by appellants that the arrangements, made in London and detailed above, constituted in each case a discharge of the bill sued on ; that any alteration of the memorandum as to the due date made on the top right-hand corner of any bill constituted a material alteration of the bill, which in law avoided it, or which, in the alternative, produced the result, that there was thereafter a second instrument, chargeable with duty, written on the original piece of stamped paper, which, however, not being further stamped, was wholly inadmissible in evidence.

Held : that there was no discharge of the bills, that the bills were not altered at all, and that no second instrument, that is, no bill of exchange, was written on the old stamped paper at all. The old instrument remained unaffected, and nothing was added to or taken from it : A. I. R. 1927 Bom. 13, Affirmed ; 86 I.C. 115=A.I.R. 1925 Bom. 187 and 49 Bom. 351, Overruled. (*Lord Sumner.*) H. PESTONJI & Co. *v.* COX AND CO. **113 I.C. 124=5 O.W.N. 706=52 Bom. 589=26 A.L.J. 1245=30 Bom. L.R. 1503=1928 M.W.N. 881=55 I.A. 353=49 C.L.J. 32=A.I.R. 1928 P.C. 231. (P.C.)**

——Adding " with interest " when the rate already specified is not material alteration. (*Lord Sumner.*) TULSI RAM *v.* RAM SARAN. **86 I.C. 552=27 Bom. L.R. 777=29 C.W.N. 965=22 M.L.W. 86=26 P.L.R. 419=23 A.L.J. 109=2 O.W.N. 256=6 L.R.P.C. 70=A.I.R. 1925 P.C. 80=49 M.L.J. 132. (P.C.)**

——Promissory note—Stipulation to pay interest interpolated without executant's knowledge—Instrument becomes void. (*Ryves, J.*) SUNDER KHATIK *v.* MAHADEO PANDE. **87 I.C. 796=23 A.L.J. 253=A.I.R. 1925 All. 282.**

——A material alteration which renders a pro-note void does not discharge the maker from all liability. Where a pro-note becomes void owing to a material alteration, but the executant admits the loan, the executant is not entitled to be entirely discharged from the liability to return the loan but is bound to do so to the extent to which he has admitted the same. (*Dalal, J.C.*) ZULFIQAR AHMAD *v.* ROBERT ELLIET. **85 I.C. 423=A.I.R. 1925 Oudh 486.**

——Change of name of payee is a material alteration. (*Stuart and Ryves, JJ.*) KAMAL KHAN *v.* NIZAMUDDIN. **71 I.C. 412=20 A.L.J. 987=4 L.R.A. Civ. 47=A.I.R. 1923 All. 123.**

——In suits for bond-debts brought on the basis of altered documents the plaintiff is not entitled to succeed. A material alteration destroys the right of action on the document. (*Prideaux, A.J.C.*) PANDURANG *v.* KISHAN. **74 I.C. 20=19 N.L.R. 79=7 N.L.J. 39=A.I.R. 1923 Nag. 295.**

——The alteration in a pro-note of the date of execution, is a material alteration. (*Pratt, J.*) KEDAR NATH SING *v.* W. C. GARRAD. **77 I.C. 761=11 L.B.R. 382=1 Bur. L.J. 244=A.I.R. 1922 L.B. 40.**

—S. 91—Proof of presentment.

Where there is no allegation that the presentment was excused, the plaintiff must prove that the drawee was required to accept the bill and that he dishonoured it by non-acceptance. (*Venkatasubba Rao and Srinivasa Aiyangar, JJ.*) KADAPPA CHETTY *v.* THIRUPATHY CHETTY. **86 I.C. 576=21 M.L.W. 210=A.I.R. 1925 Mad. 444.**

NEGOTIABLE INSTRUMENTS ACT, (1881)—S. 118—Presumption of consideration.

—S. 98—Notice of dishonour.

The use of the singular " drawer " followed by the plural " drawers " in S. 98 shows that if the acceptor is one of the drawers, both the drawers would be liable even though no notice of dishonour has been given (*obiter*). (*Sulaiman and Kendall, JJ.*) KUNDAN LAL *v.* SAHU BHIKARI DAS ISHWAR DAS. **116 I.C. 293=51 All. 530=1929 A.L.J. 333=A.I.R. 1929 All. 254.**

—S. 104—Inland Bill.

If a bill of exchange is drawn upon a resident in British India, it still remains an inland bill wherever it may have been drawn. (*Buckland, J.*) A. G. KIDSTON & CO. LTD. *v.* SETH BROTHERS. **A.I.R. 1930 Cal. 692.**

—S. 104—Protest

——*Bill drawn in England on a person in British India—Protest, if necessary.*

A bill drawn upon a resident in British India is an inland bill for which no protest is necessary. The fact that the bill was drawn out of British India (in England) does not make it a foreign bill. (*Buckland, J.*) KIDSTON & CO., LTD. *v.* SETH BROTHERS. **57 Cal. 730.**

—S. 105—'Reasonable Time.'

In considering the question of reasonable time facts such as the distance at which persons live from each other, the course of dealings with respect to similar instruments, the nature of the instrument and all such other circumstances applicable to the case ought to be considered. But when these facts have been ascertained, the reasonableness of the time becomes a mixed question of law and fact. (*Shadi Lal, C.J. and Agha Haidar, J.*) BAHADUR CHAND *v.* GULAB RAI. **116 I.C. 887=11 Lah. 34=A. I. R. 1929 Lah. 577.**

—S. 115—Drawee in case of need.

Non-presentment to drawee in case of need absolves drawer from liability. (*Shadi Lal, C.J. and Agha Haidar, J.*) BAHADUR CHAND *v.* GULAB RAI. **116 I. C. 887=11 Lah. 34=A.I.R. 1929 Lah. 577.**

—S. 118—Presumption as to holder.

——*Negotiable Instrument obtained by fraud and endorsed to holder.*

Holder has to prove that he is holder for value and that he obtained instrument before it became payable and without having cause to suspect endorser's title. (*Phillips and Thiruvenkatachariar, JJ.*) RAMANADAN CHETTIAR *v.* GUNDU AYYAR. **113 I. C. 456=1928 M.W.N. 680=A.I.R. 1928 Mad. 1238.**

—S. 118—Presumption as to stamp.

——*Hundi lost—Presumption is that it is duly stamped and cancelled.*

Where a hundi has been a lc[illegible] resumption arises under S. 118 (f) that the hundi was duly stamped and the stamp was duly cancelled: A.I.R. 1921 Sind 77, Ref. (*Aston, A-J.C.*) ATMARAM MOHANLAL AND SONS *v.* NOTANDAS DEVI DAYAL. **A.I.R. 1930 Sind 4.**

—S. 118—Presumption of Consideration.

The presumption that arises under S. 118 that every negotiable instrument is made or drawn for consideration throws the burden of proving want of consideration upon the promisor and the burden of proof is not shifted on to the promisee by the mere fact that part of the consideration is shown not to have been paid in cash as represented in the promissory note: 1 Lah. 429; and 4 C.W.N. 82, Dist. (*Jackson A.J.C.*) BALKISONDAS *v.* RAMBAKAS. **122 I.C. 383=A. I. R. 1930 Nag. 187.**

—— Recital of consideration in pro-note false—Burden of proof is shifted to holder of note—Case is stronger when consideration has to be proved against

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third parties : 29 M. L. J. 236 ; 31 I. C. 739 ; and 20 Bom. 367 ; Rel. on. (*Phillips and Odgers, JJ.*) P. L. M. PALANIYAPPA *v.* S. RAJAGOPALA.

111 I.C. 407 = 1928 M.W.N. 425 = A.I.R. 1928 Mad. 773.

———There is a legal presumption under S. 118 that an endorsement on a promissory note is for valuable consideration. (*Tekchand, J.*) SUNDAR SINGH *v.* KHUSHI RAM. **102 I.C. 42 = 28 P.L.R. 295 = 9 L.L.J. 254 = A.I.R. 1927 Lah. 864.**

———Pro-note obtained for unlawful consideration—*Onus* is on holder to prove that he is holder in due course and for consideration. A. I. R. 1924 Lah. 462, Dist. (*Addison, J.*) RAMDAS *v.* LAL CHAND. **101 I.C. 325 = 28 P.L.R. 68 = A.I.R. 1927 Lah. 137.**

———*Pro-note Suit—Proof of different consideration—Effect.*

In a suit on promissory note which contained a recital that the consideration was paid in cash, the plaintiff abandoned the recital and undertook to prove that the consideration consisted partly of cash and partly of reduction of defendant's liability to a certain firm which was in turn indebted to the plaintiff, he failed to prove the latter part of the case. *Held* that in respect of the latter part a decree could not be passed in plaintiff's favour merely on the strength of the defendant's signature.

Obiter : He could have got a decree for the whole amount if he had offered no evidence at all but relied on the recital. (*Mears, C. J., and Piggott, J.*) SHAMBHU DAYAL *v.* LALLU MAL. **80 I.C. 717 = 4 L.R.A. Civ. 458 = A.I.R. 1924 All. 256.**

———Under S. 118 it is a legal presumption that every negotiable instrument is made or drawn for consideration and that every transfer is also for consideration ; further, that the holder of a negotiable instrument is a holder in due course. The *onus* is upon the person challenging the rights of the transferee to prove facts which would show that such transferee was not in fact a holder in due course. (*Scott-Smith and Fforde, JJ.*) HINDUSTAN ASSURANCE AND MUTUAL BENEFIT SOCIETY, LTD., GUJRANWALA *v.* GURDIT SINGH. **80 I.C. 741 = 6 L.L.J. 183 = A.I.R. 1924 Lah. 462.**

———*Promissory Note—Consideration*—Onus *is on defendant to disprove passing of consideration but may shift by reason of plaintiff's evidence in respect thereof.*

Though it is undoubted that the *onus* does lie upon the defendant, to prove that no consideration was given, nevertheless, if a plaintiff, when consideration was denied in the written statement, goes into the witness box, and if the result of his examination is that he fails to establish the point which he set out to make, namely, that he gave the consideration and the Court is thus satisfied that he did not give the consideration which he alleges, the defendant can avail himself of that and has a right to decree. This in no way trenches upon the ordinary rule that the defendant must prove absence of consideration if that is his case. (*Mears, C. J. and Banerjee, J.*) MUHAMMAD SHAFI KHAN *v.* MUHAMMAD MOAZZAM ALI KHAN. **79 I.C. 464 = 67 I.C. 684 = A.I.R. 1923 All. 214.**

———Where the plaintiff alleges that the Hundi which he drew in plaintiff's favour was by way of loan to the defendants in the form of a Hundi and the defendants pleaded that it was for consideration, *held* that in view of S. 118 the *onus* is on the plaintiff to prove that the Hundi was not for consideration but by way of loan. (*Kotwal, A. J. C.*) GOVARDHAN DAS *v.* R. S. HARLAL RAMSUKH. **69 I.C. 541 = A.I.R. 1923 Nag. 62.**

NEGOTIABLE INSTRUMENTS ACT, (1881)—S. 120—Estoppel.

———The presumption that a pro-note was for consideration will not necessarily apply in a criminal trial and the prosecution must prove that the promissory note was in fact executed for consideration and that the accused committed perjury in saying that they were without consideration. (*Gokul Prasad, J.*) SAKHAWAT HAIDAR *v.* EMPEROR. **59 I.C. 198 = 22 Cr.L.J. 54 = 18 A.L.J. 1151.**

———*Suit on pro-note*—Onus, *Shifting of.*

There is no doubt a presumption under the law that the maker of a promissory note has received the consideration for it. But the fact that the plaintiff's agent's statement with regard to the consideration for the promissory note is entirely inconsistent with the plamtiff's allegation in his plaint is sufficient to shift the *onus* at once to the plaintiff. 48 P. R. 1915 Foll. (*Martineau, J.*) SURAJ-UD-DIN *v.* MT. CHAMPO. **68 I.C. 443 = 3 L.L.J. 439 = A.I.R. 1921 Lah. 148.**

—S. 118—Presumption—Nature of.

The presumption under S. 118 is always a rebuttable presumption: 47 Cal. 861; Ref. (*Campbell and Moti Sagar, JJ.*) BULAQI MAL *v.* ABDUL RAHIM. **75 I.C. 950 = A.I.R. 1923 Lah. 638.**

—S. 118—Presumption under.

Suit on promissory note—Plea, execution during minority—Proof that creditor's accounts defective, and conduct suspicious—Presumption against creditor. (*Stuart, C.J. and Raza, J.*) JAWAHIR LAL *v.* MANNA LAL. **6 O.W.N. 1046 = A.I.R. 1930 Oudh 108.**

———The provisions of S. 118 of the Negotiable Instruments Act (1881) do not affect the question with regard to the admissibility in evidence of a document which depends entirely upon the document as it stands. (*Macleod, C. J. and Coyajee, J.*) RAMPRASAD SHIVLAL *v.* SRINIVAS BALMUKUND. **90 I.C. 685 = 27 Bom. L.R. 1122 = A.I.R. 1925 Bom. 527.**

———Promissory note not a Negotiable Instrument—Presumption under S. 118 does not apply—Executant defendants pleading total or partial absence of consideration—Plaintiff must prove payment: 100 P.R. 1915, Foll. (*Scott-Smith and Campbell, JJ.*) BARKET ULLAH *v.* MUHAMMAD HAYAT ALI KHAN. **84 I.C. 866 = 6 L.L.J. 542 = A.I.R. 1925 Lah. 272.**

———Where the endorsee has no sufficient cause to believe that there was any defect in the title of the person from whom he derived his title he is a holder in due course, and the presumption in S. 118 will be in favour of the endorsee. (*Kulwant Sahay, J.*) KISHAN BAHADUR *v.* SASSARAM LIME, LTD. **80 I.C. 572 = 2 Pat. L.R. Civ, 54 = A.I.R. 1924 Pat. 521.**

—S. 120—Application of.

The condition precedent to the application of S.120 is that there must be a properly stamped bill of exchange before the Court at which the Court is entitled to look.(*Daniels, J.*) CHOTEY LAL *v.* GIRRAJ KISHORE. **93 I.C. 63 = 48 All. 332 = A.I.R. 1926 All. 359.**

—S. 120—Estoppel.

———*Promissory note by minor—If can be enforced against the minor.*

A person is not precluded under S. 120 of the Negotiable Instruments Act from denying the validity of the note on the ground that he was a minor on the date of the note, as the specific provision in S. 120 is

NEGOTIABLE INSTRUMENTS ACT, (1881)—
—S. 120—Estoppel.
subject to the general rule enacted in S. 26. (*Venkata subba Rao and Reilly, JJ.*) CHENGALROYA CHETTI *v.* NAINAPPA NAICKER. **117 I.C. 133. (Mad.)**

———A promissory note made by a minor is void and the minor is not, because of S. 120, precluded from denying the validity of the note on the ground that he did not possess the capacity to contract, S. 120 being subject to the general provision in S. 26: A. I. R. 1919 P.C. 129, Foll. (*Venkatasubba Rao and Reilly, JJ.*) M. CHENGALROYA CHETTI *v.* NAINAPPA NAICKER. **117 I.C. 133 (Mad.)**

NEGOTIABLE SECURITY.
See NEG, INST. ACT.

NEIGHBOURS.
—Tree.
The owner of the property where the tree stands is bound to remove that portion of the tree which has fallen on stranger's property and if he does not do so the stranger can remove it himself. (*Bucknill and Kulwant Sahay, JJ.*) MT. MAHABALI DASIN *v.* MANU MANDAL. **74 I.C. 828 = A.I.R. 1924 Pat. 416.**

—Vacant site.
Until the contrary is proved, it may generally be presumed, that the open space in a pole belongs to the owners of the surrounding houses, and it would be for the owners of the other houses and not the Municipality nor the Government to protest against any obstructions caused by the owner of one house against their common rights. (*Macleod, C.J., and Crump, J.*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* BHATT LAXMISHANKER GOVINDRAM.
76 I.C. 591 = A.I.R. 1925 Bom. 27.

NEW BRUNSWICK JUDICATURE ACT, 1909.
—S. 24 (1)—Interest.
———*Interest Act* (XXXII *of* 1839)*—Certain sum payable on contingency—Interest cannot be allowed on such sum.*

A certain sum is not payable by the written instrument at a certain time if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when those events happen and the time for the happening of those events, it they ever do happen, may be indefinitely postponed and no interest can be allowed on such sum. 7 M.I.A. 263, Foll. (*Lord Tomlin*). MAINE AND NEW BRUNSWICK ELECTRICAL POWER CO. LTD. *v.* ALICE M. HART. **119 I.C. 615 = 30 M.L.W. 153 = 1929 A.L.J. 1065 = 1929 M.W.N. 862 = A.I.R. 1929 P.C. 185 = 57 M.L.J. 662. (P.C.)**

NEW PLEA.
See PRACTICE—NEW PLEA.

NEW POINT.
See PRACTICE.

NEXT FRIEND.
See (1) C. P. CODE, O. 32.
(2) MINOR.

NIHANG GOSAINS.
See (1) HINDU LAW—SUCCESSION,
(2) MAHOMEDAN LAW.

NOMINATION.
See WILL.

NIGERIA, COLONY OF.
—Interest in Lands.
——— *General character of title of natives to lands in Lagos State.*

The paramount chief is owner of the lands, but he is not owner in the sense in which owner is understood in England. He has no fee simple, but only a usufructuary title. He may have some individual lands which he occupies himself, but as regards other lands they are occupied for his household, *i.e.*, before the abolition of slavery, for his slaves. These various occupiers have the right to remain and to transmit their holdings to their offspring, but in the event of the family of an occupier failing and being extinct, the chief has a right of reversion: *Amodu Tijani* v. *Secretary, S. Nigeria*, (1921) 2 *A. C.* 399 *and Sunmonu* v. *Disu Raphael.* (1927) A. C. 881, Foll. (*Viscount Dunedin*). SAKARIYAWO OSHODI *v.* MORIAMO DAKOLO. **A.I.R. 1930 P.C. 261. (P.C.)**

NON-JOINDER.
See C. P. CODE, S.99, O.1. RR. 9 & 13 & O. 34 and R.I.

NON-OCCUPANCY HOLDING.
See (1) LANDLORD AND TENANT.
(2) OCCUPANCY HOLDING.

NON-TRANSFERABLE HOLDING.
See OCCUPANCY HOLDING.

NORTHERN INDIA CANAL AND DRAINAGE ACT (VIII of 1873).
—S. 6—Suit for damages.
Where the construction of the Raya Branch Tail Distributary of the Upper Chenab Canal caused the flood water to go to the plaintiff's property in the high floods of 1917, and thereby caused them serious damage: *Held*, that action of the Canal Officers in constructing this channel came under S. 6, and whether that action was wise or unwise, any suit for damages must be brought within 90 days of the date of damage. (*Harrison and Zafar Ali, JJ.*) THE PUNJAB COTTON PRESS CO. *v.* THE SECRETARY OF STATE FOR INDIA. **79 I.C. 185 = 4 Lah. 432 = A.I.R. 1924 Lah. 192.**

—S. 15—Construction.
The words "may execute all works which may be necessary for the purpose of repairing or preventing such accident" are independent of the preceding words "may enter upon any land adjacent to such canal." (*Harrison and Zafar Ali, JJ.*) THE PUNJAB COTTON PRESS, CO. LTD. *v.* THE SECRETARY OF STATE FOR INDIA. **79 I.C. 208 = 4 Lah. 428 = A.I.R. 1924 Lah. 169.**

—S. 15—Suit for damages.
———Where the canal authorities cut the bank of a canal to avoid accident to the adjoining railway and not to the canal and plaintiff's adjacent mills were damaged.

Held: that Art. 2 was not applicable as the act alleged was not done in pursuance of any enactment: 4 Lah. 428 = 79 I.C. 208 and 4 Lah. 432 = 79 I.C. 185, Reversed. (*Viscount Dunedin,*). PUNJAB COTTON PRESS, CO. LTD. *v.* SECRETARY OF STATE. **103 I.C. 1 = 1927 M.W.N 334 = 4 O.W.N. 471 = 31 .C.W.N. 835 = 26 M.L.W. 134 = 28 P.L.R. 453 = 39 M.L.T. 343 = 10 Lah. 161 = A.I.R. 1927 P.C. 72. (P.C.)**

———In the Raya branch canal, a large amount of water collected at more than one point and the Canal Officer cut the channel in various places to allow this surplus water to escape into the lower lands on the west of the distributary. In spite of this action the flood water was held up and diverted from its natural course and eventually reached the property of the plaintiff, and injured it: *Held* that the action taken in dealing with the flood is covered by S. 15, that Art. 2 of the Limitation Act applied and that the terminus *a quo* in calculating limtation is the date of the damage and notthe dateof the construction of the work which caused the damage. (*Harrison and Zafar Ali, JJ.*) THE PUNJAB COTTON PRESS, CO. LTD, *v.* THE SECRETARY OF STATE FOR INDIA,

NORTHERN INDIA CANAL AND DRAINAGE ACT, (1873), S. 20—Presumption.

79 I.C. 208=4 Lah. 428=A.I.R. 1924 Lah. 169.

—S. 20—Presumption.

——Where a water-course is thirty years old a Court will be entitled to draw a presumption that it was started by agreement or action was taken under S. 20 or S. 21. (*Dalal, J.*) GANGA SAHAI *v.* EMPEROR.

116 I.C. 785=1929 A.L.J. 463=10 L. R. A. Cr. 89=12 A. I. Cr. R. 19=30 Cr. L.J. 669=A.I.R. 1929 All. 271.

—S. 31—Offence under.

——*Use of water for building is not punishable.*

Section 70 (12) punishes a person who violates any rule made under the Act for a breach of which a penalty may be incurred. The use of water from a tank which has been filled with canal water for building of a pucca house, though not authorised under Rule 10 of Section 31, is not penalised by any Section of the Act and is therefore not punishable. (*Shadi Lal, C.J.*) HARNAM SINGH *v.* EMPEROR.

64 I.C. 497=7 P.L.R. 1922=23 Cr. L.J. 17=A.I.R. 1921 Lah. 187.

—S. 67—Suit for damages.

Government, for preventing intersection of canal and stream, constructing a superbridge—Expert advice drawing Government's attention to danger to neighbouring lands being flooded—Practice of removing silt observed for many years but discontinued as being expensive and not necessary for purposes of canal authorities—Plaintiff's lands overflooded—Suit for damages and injunction is cognizable by civil Courts—Discontinuance amounts to unreasonable conduct or negligence—Government must pay damages to plaintiff—English Case-Law considered. 28 M. 72 Foll. (*Kendall and Nimat Ullah, JJ*). SECRETARY OF STATE *v.* ALLADIN. **114 I.C. 727=51 All. 291=26 A.L.J. 1151=9 L.R.A. Rev. 311=A.I.R. 1928 All. 735.**

—S. 68—Jurisdiction.

Divisional Canal Officer has jurisdiction to decide differences even after warabandi is fixed. 25.P. R. 1893 Dist. (*Addison, J.*) FAKIR MAHOMED *v.* GANDA SINGH. **116 I.C. 311=A.I.R. 1929 Lah. 260.**

—S. 70—Distribution.

"Internal distribution" in a village by the village community is not an authorised distribution within S. 70 (4) as it is not formally approved or sanctioned by any canal authority; where they have merely accepted the distribution made by the villagers and disturbing the arrangement of the village community does not justify conviction. (*Chevis and Dundas, JJ.*) EMPEROR *v.* PAKHAR SINGH. **60 I.C. 59=22 Cr. L.J. 203=1 Lah. 604.**

—S. 70—Offence under.

Where the petitioner was never told what rule he had violated and where though violation about rules of taking turns of water was alleged yet no authorized warabundi was produced:

Held: that merely a general accusation of breach of rules made under S. 70 was wholly inadequate. (*Johnstone, J.*) SANDHI *v.* EMPEROR. **123 I.C. 530=1930 Cr. C. 22=31 Cr. L.J. 528=A.I.R. 1930 Lah. 54.**

——*Accused severely injured by complainant—Maximum sentence is unnecessary.*

In revenge for the offence committed by the accused, he was attacked by certain persons one of whom used a *kahi*, and the bone of his nose was shivered into several fragments.

NUISANCE.

Held: that under such circumstances the maximum sentence of one month's rigorous imprisonment was not necessary but that 15 days' rigorous imprisonment was enough. (*Campbell, J.*) GURAN DITTA *v.* EMPEROR. **6 L. L. J. 620=A.I.R. 1925 Lah. 279.**

——*Merely permissive watercourse—Stoppage is no offence.*

A right to obtain the passage of water over another man's property can be secured legally by the Canal Department acting on its own authority or it can be obtained on the application of a private person to the Divisional Canal Officer under Section 21 of the Act. Such a right can also be obtained by a private agreement. But where one person merely permits another to take water on a water course existing on the former's land and then discontinues the permission and stops the water course, he is not guilty under Section 70. The Act in no way contemplates that one man has a right to the passage of water for his fields through the fields of another except that such right is derived in any of these ways from the Canal Authorities or obtained by private agreement. (*Wilberforce, J.*) HUKMAN *v.* EMPEROR. **61 I.C. 717=13 P. L. R. 1921=22 Cr. L.J. 429=A. I. R. 1921 Lah. 327.**

NORTH-WEST FRONTIER PROVINCE LAW AND JUSTICE REGULATION (VII of 1901).

—S. 27—Custom.

Even though there be no evidence of instances, still, if the custom spoken to by the party's witnesses is in accordance with the custom applicable to his community according to the manual of the Customary Law of the district, there is sufficient *prima facie* evidence of the existence of the custom, subject, of course, to rebuttal, and the evidence ought not to be held insufficient merely for want of instances. (*Sir John Wallis.*) MT. VAISHNO DITTI *v.* MT. RAMESHRI. **113 I. C. 1=10 Lah. 86=55 I. A. 407=1929 M. W. N. 5=49 C. L. J. 38=29 P. L. R. 654=28 M. L. W. 908=A. I. R. 1928 P. C. 294=55 M. L. J. 746. (P. C.)**

N. W. P. ACTS.
See (1) AGRA TENANCY ACT.
(2) U. P. ACTS.

N. W. P. RENT ACT.
See AGRA TENANCY ACT.

N. W. P. TENANCY ACT.
See AGRA TENANCY ACT.

NOTARY PUBLIC.
See NEG. INS. ACT.

NOTICE.
See (1) CR. P. CODE, Ss. 195, 437 & 530.
(2) T. P. ACT, S. 3.

—Prior Agreement.
See SP. REL. ACT, S. 27.

NOTICE OF SUIT.
See (1) C. P. CODE, S. 80.
(2) LOCAL ACTS.

NOTICE TO SUIT.
See (1) LANDLORD AND TENANT.
(2) T. P. ACT, Ss. 106 AND 113.

NOVATION.
See CONTRACT ACT, S. 62.

NOVATION OF CONTRACT.
See CONTRACT ACT, S. 62.

NUISANCE.
See (1) C.P.CODE, S. 91.
(2) CR. P.CODE, S. 133 etc.
(3) PENAL CODE, Ss. 290-291.
(4) TORT.

OATHS ACT (1873)—Interpretation. —Injunction.

See (1) SP. REL. ACT, SS. 52 to 57.
(2) TORT.

OATH.

See OATHS ACT.

OATHS ACT (X of 1873.) —Interpretation.

The provisions of the Oaths Act are not intended to be utilized in such a manner as would abrogate the provisions of the Evidence Act. (*Kinkhede, A.J.C.*) SK. JAMU *v.* MOHAMED IBRAHIM. **90 I.C. 378= A.I.R. 1926 Nag. 194.**

—Irregularities under.

Asking a party whether he would take oath and not recording the fact and not actually offering the oath, are irregularities vitiating trial. (*Sanderson, C.J. and Richardson, J.*) AFSAR KHAN *v.* SHABU MANDAL. **77 I.C. 556=A.I.R. 1922 Cal. 148.**

—S. 1—False statement.

Evidence given under special oath is conclusive only as against the person who offers to be bound by it; but does not prevent the court from attempting to establish that a particular statement made by the appellant was false in fact and false to his knowledge. (*Shah Ag., C.J. and Fawcett, J.*) RAMDAS VISHNUDAS, *In re.* **82 I.C. 359=26 Bom. L.R. 713= 25 Cr. L.J. 1287=A.I.R. 1924 Bom. 511.**

—S. 1—Special Oath.

Evidence given under special oath is conclusive only as against the person who offers to be bound by it; but does not prevent the Court from attempting to establish that a particular statement made by the appellant was false in fact and false to his knowledge. (*Shah, Ag. C.J. and Fawcett, JJ.*) RAMDAS VISHNUDAS, *In re.* **82 I.C. 359=26 Bom. L.R. 713= 26 Cr. L.J. 1287=.A.I.R. 1924 Bom. 511.**

—S. 4—False Evidence.

Though the Act extends to the territories of Native Princes and States in alliance with His Majesty so far as regards the subjects of His Majesty, the Vyara Court in the Baroda State cannot be treated as a Court within the meaning of Ss. 4 and 14 of the Act, in relation to proceedings which were held before that Court entirely under the law of that State, and which had nothing to do with any proceedings in British India or under the law in force in British India. (*Shah and Khajiji, JJ.*) RAMBHARTHI HIRABHARTHI, *In re.* **47 Bom, 907=25 Bom. L.R. 772= 25 Cr.L.J. 333=A.I.R. 1924 Bom. 51.**

—S. 5—Administration of oath.

In every case where a witness is a competent witness within the meaning of S. 118 of the Evidence Act, the provisions of Ss. 5 and 6 of the Oaths Act ought to be applied. The only cases in which an oath of affirmation should not be administered are cases in which it clearly appears that the person who makes the oath or the affirmation does not understand the moral obligation attaching to an oath or affirmation, or the consequences which may arise from giving false evidence or the iniquity of so doing, and in such cases it is obvious that the evidence of such a person would be practically valueless. (*Miller, C. J. and Adami, J.*) FATU SANTAL *v.* EMPEROR. **61 I. C. 705=2 P. L T. 288=6 P. L J. 147= 22 Cr. L. J. 417=A. I. R. 1921 Pat. 109.**

—S. 5—Applicability.

Section 5 was intended to apply to an accused person while he is under trial. (*Sanderson, C. J. and Panton, J.*) GALLAGHER v. EMPEROR. **101 I. C. 657=54 Cal. 52=28 Cr. L. J. 481= A.I.R. 1927 Cal. 307.**

OATHS ACT (1873), S. 8—Oath under. —S. 5—Child.

A child of tender years should be examined as a witness only after the Court has satisfied itself that the child is intellectually sufficiently developed to enable it to understand sufficiently what it has seen and afterwards inform the Court thereof. If the Court is satisfied that the child has such intelligence, it should comply with the provisions of S. 6 of the Indian Oaths Act. (*Kalumal Pahlumal, A. J. C.*) SYED RASUL *v.* EMPEROR. **120 I.C. 514= 31 Cr. L. J. 114.**

—S. 8—Agreement to be bound by oath.

The offer of the guardian of a minor defendant on behalf of the minor to abide by the deposition to be given by a plaintiff on a special oath stands on a very different ground from an agreement or compromise contemplated by O. 32, R. 7, and in such a case the minor is bound by the consent of his guardian although given without the leave of the Court provided there is no fraud or gross negligence on the part of the guardian. 27 Cal. 229, Foll, (*Mukerji and Guha, JJ.*) MAHAMMAD MAHMUD CHOUDHURY *v.* BEHARY LAL SAHA. **34 C. W. N. 310= A. I. R. 1930 Cal. 463.**

——In the course of the suit the defendant agreed to abide by the oath of one of the plaintiffs M. The plaintiff M took the required oath and on the basis of his evidence the learned Munsif decreed the suit. The defendant appealed to the Dt. Judge who remanded the case to the Munsif to take further evidence on the facts.

Held: that the District Judge acted illegally and with material irregularity in entering into merits and in setting aside the decree of the Munsif. (*Daniels, J.*) MITTU LAL *v.* SRI LAL. **74 I.C. 918=45 All. 724= 21 A.L.J. 637=4 L.R.A. Civ. 596= A. I. R. 1924 All. 126.**

——Agreement to be bound by opponent's oath is binding though procedure of oath is not one ordinarily recognised in Court, if Court is permitted to administer such oath. (*Walsh, J.*) KESHO RAM *v.* PEARE LAL. **71 I. C. 761=21 A. L. J. 209= 4 L. R. A. Civ. 368=A. I.R. 1923 All. 443.**

——A contract to be bound by oath is a valid contract provided it is an oath which the Court is permitted to administer under Section 8, Oaths Act. (*Walsh, J.*) KESHO RAM *v.* PEARE LAL. **71 I. C. 761= 21 A. L. J, 209=4 L. R. A, Civ. 368= A. I. R. 1923 All. 443.**

—S. 8—Duty of Court.

Party agreeing to abide by oath of certain person—Consent subsequently withdrawn—Court should either administer the oath and decide on that or proceed according to law with appropriate inference from party's refusal. (*Jai Lal, J.*) BALU RAM *v.* NATHU RAM. **99 I. C. 288=A.I.R, 1927 Lah. 78.**

—S. 8—Oath—Nature of.

It is not permissible for a Court to allow to an oath to be taken by a man by holding his son in his lap with his hand placed on the son's head as it is an oath affecting a third person. (*Sulaiman and Daniels, JJ.*) TULSHI RAM *v.* DAYA RAM. **88 I. C. 448= 23 A. L. J. 513=6 L. R. A. Civ. 396= A. I. R. 1925 All. 604.**

—S. 8—Oath under.

——*Invocation—Necessity for—Solemn affirmation.*

Upon a sound construction of the Ss. 8, 9 and 10, neither an invocation nor an oath or affirmation in the technical sense of these words is in any way an essential part of the so-called oath or solemn affirmation referred to in S. 8 of the Act.

The "oath or solemn affirmation" referred to in

OATHS ACT (1873), S. 8—Scope of.

S. 8 and following sections is something quite distinct from the oaths and affirmations referred to in S. 5. These are to be in such form as the High Court shall prescribe (S. 7). With regard to the oath or solemn affirmation referred to in S. 8, however, it may be as infinite, alike in form and content, as racial custom or the dictates of any religious persuasion may, within the prescribed limits sanction or require. But 'from its very nature and essence it can never be in any part of it dependent upon the direction or dictation of the High Court or of any other extra racial or secular administrative authority. The "oath or solemn affirmation" when permitted is a complete substitute for the ordinary oath. (*Lord Blanesburgh.*) INDAR PRASAD *v.* JAGMOHAN DAS. **103 I. C. 386=2 Luck. 316=54 I. A. 301=1 L. C. 167=29 Bom. L.R. 1154=46 C.L.J. 13=1927 M.W.N. 534=31 C.W.N. 1053=26 A.L.J. 7=26 M.L.W. 619=39 M.L.T. 618=A.I.R. 1927 P.C. 165=53 M.L.J. 1. (P. C.)**

—S. 8—Scope of.

Where an agreement is merely to abide by the statement of a referee even though not 'on oath or solemn affirmation' S. 8 or S. 9, does not apply. Even if they apply the Court has discretion to refuse to refer the matter to the referee under certain special circumstances. S. 9, is not mandatory. (*Sulaiman, J.*) MT. MASITA BIBI *v.* KHUDA BAKSH. **79 I.C. 245=A.I.R. 1923 All. 65.**

—S. 8—Special Oath.

The use of the alternative expression "oath" and "solemn affirmation" as a description of the special ritual envisaged in S. 8, is intended to indicate that the ritual is to be at least as solemn for the deponent and attended by the same consequences to him as is an ordinary oath or affirmation for and to an ordinary witness. The words were selected primarily to put it beyond the possibility of doubt that the temporal consequences of corrupt falsehood would follow as inevitably for the one class of witness as for the other; they are descriptive of the nature and result of the ritual; they are in no way concerned with its form: A.I.R. 1924 Oudh. 442, Affirmed. (*Lord Blanesburgh.*) INDAR PRASAD *v.* JAGMOHAN DAS. **103 I.C. 386=2 Luck. 316=54 I.A. 301=1 L.C. 167=29 Bom. L.R. 1154=46 C.L.J. 13=1927 M.W.N. 534=31 C.W.N. 1053=26 A.L.J. 7=26 M.L.W. 619=39 M.L.T. (618=A.I.R. 1927 P.C. 165=53 M.L.J. 1 (P.C.).**

—S. 9—Agreement to be bound by oath.

The offer that the case should be decided in accordance with the statement of a witness undoubtedly amounts to an offer to be bound by his deposition. (*Sulaiman and Niamatullah, JJ.*) RAM RATAN *v.* RAM LAL SINGH. **118 I.C. 188=1929 A.L.J. 1095=A.I.R. 1929 All. 750.**

———*Binding nature of the Oath.*

Sections 9 and 11 do not require that all parties in a suit should agree to be so bound. The evidence given is binding as against those parties who have offered to be bound. (*Sulaiman and Niamatullah, JJ.*) RAM RATAN *v.* RAM LAL SINGH. **118 I.C. 188=1929 A.L.J. 1095=A.I.R. 1929 All. 750.**

———*C. P. Code O. 32, R. 7—Guardian.*

An agreement by the guardian on behalf of the minor to be bound by the statement of a certain witness does not amount to a compromise requiring sanction of the Court for its validity and is binding upon the minor without such sanction. (*Walsh and Banerji, JJ.*) DEORAJ MISRA *v.* MT. ABHAI RAJI. **102 I.C. 33=25 A.L.J. 729=43 All. 842=A.I.R. 1927 All. 584.**

OATHS ACT (1873), S. 9—Conclusive evidence.

———Where the defendant agreed that if the plaintiff's witness ate food from the plaintiff's mother who was alleged to have given birth to the plaintiff in an illegitimate way the suit should be decreed against him and further the defendant stated that if the plaintiff would serve that food to the witness he was willing that the suit should be decreed and when both these things were done but before the decree was passed the defendant put in an application resiling from the application, *held* that so far as the legitimacy of the plaintiff was concerned the point had been conclusively settled against the defendant but that the other issues must be decided on the merits. (31 Mad. 1 Foll.) (*Daniels, J.*) BHAWANI PRASAD *v.* RAM SUNDER. **79 I.C. 353=22 A.L.J. 301=5 L.R.A, Civ. 268=A.I.R. 1924 All. 911.**

———A party's agent binds the party by an agreement under Section 9 as much as a party himself. A *vakalatnama* gives sufficient authority to a pleader to agree to make a reference under S. 9, 3 A.L.J. 654 Ref. (*Sulaiman, J.*) MT. MASITA BIBI *v.* KHUDA BAKSH. **79 I.C. 246=A.I.R. 1923 All. 65.**

———*Guardian's powers.*

The guardian *ad litem* of a minor defendant in a pre-emption suit agreed that on plaintiff's taking oath that he had refused to take the property in suit before the execution of the sale-deed, his suit should be decreed and plaintiff took such an oath.

Held: the minor defendant was bound so far as the plaintiff's statement that he had not refused to purchase the property was concerned, but the agreement that the suit should be decreed was not binding inasmuch as it amounted to compromise of the suit which cannot be made without the leave of the Court. (*Tudball and Sulaiman, JJ.*) PARBHU DAYAL *v.* JAMIL AHMAD. **64 I.C. 646=44 All. 117=19 A.L.J. 911=A.I.R. 1922 All. 160.**

———Under Ss. 9 and 11 of the Oaths Act of 1873, the evidence given is conclusive proof of the matter stated as against the person who offered to be bound. The party cannot after agreeing to be bound, retract from it on the ground that the particular statement of the person does not dispose of the suit. If the agreement is accepted by the other party and recorded by the Court, it becomes a complete adjustment of the suit. (*Kendall, A.J.C.*) HAMID ALI *v.* NAQIALI. **84 I.C. 729=27 O.C. 217=A.I.R. 1925 Oudh 104.**

———*Nature of.*

Where an offer is made by plaintiff to be bound by oath, the court has full discretion to call upon the deft. to accept or refuse the offer; and, subject to the exercise of that discretion, the offer once made stands, and if the defendant eventually accepts it, the plaintiff is bound by the result. It is not open to the plaintiff to withdraw the offer as in the case of an ordinary contract. (*Chevis and Harrison, JJ.*) KHAWAJ DIN *v.* MT. NUR. **65 I.C. 700. (Lah.)**

—S. 9—Application of.

———*Bombay Village Police Act of 1867.*

The proceedings before the Police Patil under Ss. 14 and 15 of the Bombay Village Police Act (VIII of 1867) are essentially criminal proceedings, and the same rule which applies to criminal proceedings ought to apply on general grounds to proceedings before the Village Patil so far as the effect of any special oath is concerned. Hence Ss. 9-11 of the Oaths Act have no application to such proceedings. (*Shah and Hayward, JJ.*) CHIMAN DAMODAR *v.* EMPEROR. **45 Bom. 96=A.I.R. 1921 Bom. 425.**

—S. 9—Conclusive evidence.

Where a party offers to be bound by the oath of a witness and the evidence is given, the evidence so

OATHS ACT (1873), S. 9—Party.

given shall as against the person who offered to be bound is a conclusive proof of the matter stated. (*Sulaiman and Niamatullah, JJ.*) RAM RATAN *v.* RAM LAL SINGH. **118 I.C. 188 = 1929 A.L.J. 1095 = A.I.R. 1929 All. 759.**

—S. 9—Party.

The language of the Act shows that the word "party" can be used not only in the restricted sense but in the wider sense. A duly authorized agent of a party can make the offer contemplated in S. 9 : 38 All. 131, Rel. on ; 14 Bom. 455, Diss. from. (*Stuart, C.J. and Pullan, J.*) AMIR *v.* MD. BAKHSH. **114 I.C. 759 = 5 O.W.N. 1070 = A.I.R. 1929 Oudh 56.**

—S. 9—Retraction of oath.

———*Discretion—Oaths Act, S.* 11.

If a party, after agreeing to an oath, satisfies the Court that there is good ground for retracting, the Court would exercise a wise discretion in refusing to administer the oath, but when a party puts forward frivolous reasons for retracting, the Court is justified in administering the oath notwithstanding the retraction : 22 Mad. 234 ; 18 All. 46 and 22 Bom. 281, Foll. (*Lindsay, J.*) SALIG RAM *v.* WALI AHMAD. **100 I.C. 473 = 49 All. 388 = 25 A.L.J. 297 = A.I.R. 1927 All. 590.**

———*When allowed.*

There is nothing in Ss. 9, 10 and 11 which allows a party, who has agreed to the administration of an oath by his opponent, to revoke his offer after it has been accepted by the latter, but the Court has discretion to allow retraction if good grounds are shown therefor : 22 Mad. 234, Foll.

Where the application to the Court was made after the oath had been administered it was too late for the Court to pass an order disallowing the taking of the oath by the party. (*Shadi Lal, C. J.*) RAM BHOJ *v.* DUNICHAND. **92 I.C. 813 = A.I.R. 1926 Lah. 240.**

—S. 9—Scope of.

Where the pleader appearing for the defendants made an offer that the suit might be decided on the oath of the opposite party and it appeared that the pleader acted under instructions from one of the defendants who presumably had been authorised by the rest to take the necessary steps, *Held*, that the parties could not resile from the offer made by the pleader. (*Mukerji and Guha, JJ.*) MOULVI MAHOMED MAHMUD *v.* BEHARY LAL SAHA. **34 C.W.N. 310.**

———There is nothing in the Oaths Act which declares that a referee, by whose statements the parties have agreed to abide, cannot be re-examined if all the points which would be necessary to be established are not put to him : 22 Mad. 234 and 13 All. 386, Dist. (*Sulaiman and Mukerji, JJ.*). RADHA KISHUN *v.* KASHINATH. **92 I.C. 510 = 48 All. 276 = 24 A.L.J. 241 = A. I. R. 1926 All. 266.**

—S. 11—Conclusive Evidence.

Application for setting aside *ex parte* decree—Parties agreeing to be bound by Deft's oath—Failure of plff. to attend-court dismissing application under S. 11. *Held* (1) Failure of plaintiff to be present did not *ipso facto* set aside the *ex parte* decree as under S. 11 it is only if oath is taken that it is conclusive proof of matters stated : declining afterwards or failure to take it is a circumstance to be taken in deciding the case. (2) Deft. should be given an opportunity to adduce evidence in support of his case. (*Devadoss, J.*) SIDDAYYA *v.* M. AMBU NAIR. **90 I.C. 577 = 22 M.L.W. 487 = A.I.R. 1925 Mad. 1264 = 49 M.L.J. 379.**

OATHS ACT (1873), S. 13—Irregularity.

———*Scope of.*

The fact that a case was decided on the oath of the defendant is not a sufficient ground for refusing the defendant an opportunity to prove to the satisfaction of the Court that the claim had been brought on a false document, to support an application under S. 476, Cr.P. Code. (*Daniels, J.*). KING-EMPEROR *v.* RAM NARAIN. **96 I.C. 877 = 7 L.R.A. Cr. 130 = Cr. L.J. 1021 = A. I. R. 1926 All. 577.**

—S. 11—Object.

———*What amounts to an oath.*

Calling on the other party to admit or deny before a particular Deity and the acceptance by the other party of the offer and actual statements before the Deity by the party accepting the offer is tantamount to taking oath. Real object of giving oath is the idea that there will be superhuman retribution in case of falsehood and consequently actual words or ceremonies are immaterial. The purpose of giving oath is not to call the attention of the God to party but to call the attention of the party to God. (*Neave and Kendal, A.J. Cs.*). INDAR PRASAD *v.* JAG MOHAN DAS. **84 I.C. 314 = 11 O.L.J. 485 = A. I. R. 1924 Oudh. 442.**

—S. 11—Conclusiveness.

Decision by oath is conclusive only 'as against the person who offered to be bound.' (*Hallifax, A.J.C.*). GANGA PRASAD *v.* SHYAMLAL. **68 I.C. 45 = A. I. R. 1923 Nag. 180.**

—S. 11—Special oath.

Special oaths can only be administered under S. 8. Without undertaking of being bound by such an oath, it cannot be conclusive proof under S. 11 of that Act. (*Madgavkar and Patkar, JJ.*) KHATIJABIBI *v.* UMARSAHEB. **110 I.C. 131 = 52 Bom. 295 = 30 Bom. L.R. 447 = A.I.R. 1928 Bom. 285.**

—S. 11—Statement by Referee.

For the application of S. 11, Oaths Act it is necessary that the statement given by a referee should amount to "evidence" of the fact in controversy between the parties. (*Ashworth and Iqbal Ahmad, JJ.*) RATI RAM *v.* HARDEWA. **103 I.C. 348 = A.I.R. 1927 All. 676.**

—S. 12—Offer of Oath.

Defendant offering to be bound by plaintiff's oath—Offer accepted, but defendant himself making it impossible for plaintiff to take it—Parties are bound by original agreement of oath and if plaintiff takes oath the suit should be decided accordingly. (*Madhavan Nair, J.*) KUNHIKRISHNAN NAIR *v.* KUNHAHMAD. **109 I.C. 758 = 1928 M.W.N. 183 = 28 M.L.W. 58 = A.I.R. 1928 Mad. 488.**

—S. 12—Refusal to take Special oath.

The mere fact that a person refuses to make special oath is not by itself sufficient to entitle the Court to presume that his case is necessarily false. His case may be perfectly true and yet for religious reasons he may be unwilling to bind his conscience by a particular form of oath, and in the absence of anything to show why a person is unwilling to make the oath, the Court is not entitled to draw an inference adverse to him. (*Cuming and Mukerji, JJ.*) AMANTULLA MIA *v.* CHHATTOO RAM. **93 I.C. 830 = A.I.R. 1926 Cal. 817.**

—S. 13—Irregularity.

Section 13 cures the form of the oath and even an entire omission to take the oath, but does not cure the absence of authority in the officer administering the oath. (*Madgavkar and Baker, JJ.*) GANPET DEVAJI *v.* EMPEROR. **116 I. C. 248 = 31 Bom. L.R. 144 = 30 Cr. L. J. 593 = 13 A.I. Cr. R. 14 = A.I.R. 1929 Bom. 136.**

OATHS ACT (1873), S. 13—Irregularity.

——S. 13 of the Oaths Act applies equally whether the omission is due to the deliberate act of the Court or whether it is due to some oversight or negligence on the part of the presiding officer. 22 W. R. (Cr.) 1 Not Foll. 22 W. R. (Cr.) 14: 23 W. R. (Cr.) 12; 32 C. L. J. 31; 16 Bom. 359; 38 Mad. 350 Appr. 10 All. 207; 11 All. 183 and 16 Mad. 105 Dist. (*Miller, C. J. and Adami, JJ.*) FATU SANTAL *v.* EMPEROR.

61 I.C. 705=2 P.L.T. 288=6 P.L.J. 147= 22 Cr.L.J. 417=A.I.R. 1921 Pat. 109.

—S 14.—Child witness.

The Court should only examine a child of tender years as a witness after it has satisfied itself that the child is sufficiently developed intellectually to understand what it has seen and to afterwards inform the Court thereof. If the child was sufficiently developed intellectually to describe what she had suffered, her testimony or account of it before the Magistrate cannot be brushed aside as inadmissible merely because no oath is administered to her. (*Zafar Ali, J.*) SUSSAIN KHAN *v.* THE CROWN.

76 I.C. 1037=25 Cr.L.J. 317= A.I.R. 1923 Lah. 332.

OBITER DICTUM.

See PRACTICE—PRECEDENTS.

OBJECTION TO ATTACHMENT.

See C. P. Code. O. 21, Rr. 57 to 63.

OBSCENE PUBLICATION.

See PENAL CODE, S. 292.

OBSTRUCTING—Public servant.

See PENAL CODE.

——Right of way.

See (1) CR. P. CODE. S. 133.
(2) PENAL CODE, SS. 185, 283, 290.

OCCUPANCY HOLDING.

—Abandonment.

When land occupied by a tenant with occupancy rights is given up by him it enures for the benefit of all the co-sharers entitled to it.(*Sulaiman, J.*) BASUDEO PANDE *v.* MOHAN PANDE. **84 I.C. 1000= 5 L.R.A. Rev. 113=A.I.R. 1924 All. 835.**

—Acquisition of.

An admission inter-partes cannot have the effect of converting what is in fact not ryoti land into ryoti land or of conferring on either party occupancy right in land which is not ryoti land. (*Wallace, J*) LINGAYYA AYYAVARU *v.* GANGIAH. **104 I.C. 892= A.I.R. 1928 Mad. 58.**

——An unfounded claim to be an occupancy raiyat cannot by lapse of time convert an under-raiyat into an occupancy raiyat however long it is persisted in; A. I. R. 1923 P. C. 118. Foll. (*Kulwant Sahay and Macpherson, JJ.*) MITA DUSADH *v.* ANU MAHTO.

109 I.C. 287=7 Pat. 566=A.I.R. 1928 Pat. 603.

——*Zirat land.*

Even in the case of zirat land the fact that an occupancy right by one cultivator has been acquired but has ceased to exist does not make it any easier for a future cultivator of land to secure a right of occupancy therein. (*Kulwant Sahay and Macpherson, JJ.*) MITA DUSADH *v.* ANU MAHTO. **109 I.C. 287= 7 Pat. 566=A.I.R. 1928 Pat. 603.**

——*Sub-tenant*

A thekadar is a tenant and consequently a person holding under him is a sub-tenant and he cannot acquire occupancy rights. (*Iqbal Ahmad, J.*) RUP NARAIN SINGH *v.* JAGRUP SINGH. **101 I.C. 638= 8 L.R.A. Rev. 194=A.I.R. 1927 All. 530.**

——*Mere long possession.*

The mere fact of the defendants having occupied the lands in dispute for over 40 years and the fact of their having planted trees upon portions of the land and of their being granted printed receipts would not establish in law a custom that the defendants who were *sikmi* tenants or under-*raiyats*, have acquired the right of occupancy in a land. (*Kulwant Sahay, J.*) CHAKURI LAL *v.* DEVCHAND MAHTON.

90 I.C. 273=A.I.R. 1926 Pat. 61.

OCCUPANCY HOLDING—Fractional share.

—Construction.

The phrase "excluding *sir* land" occurring in a decree was held to mean including the proprietary right, but excluding from it the occupancy right in the *sir* land. (*Hallifax and Kotval, A. J. Cs.*) LAKSHMI NARAYAN *v.* SHRIDHAR. **105 I.C. 420= A.I.R. 1928 Nag. 100.**

—Ejectment—Trespasser.

When a landlord sues to eject a trespasser from a tenancy holding, it is not open to the defendant, who is not a transferee from the tenant and does not hold under the tenant, to plead that the tenant has not abandoned the holding. 11 N.L.R. 124, Foll. (*Findlay, J. C.*) MOORAT SINGH *v.* MUNILAL.

103 I.C. 713=23 N.L.R. 143= A.I.R. 1927 Nag. 320.

—Execution sale.

The transfer for value of the whole or part of an occupancy holding, apart from custom or local usage is operative as against the raiyat whether it is voluntary or involuntary. The principle is a general one which applies to the case of creditors other than landlords also: A.I.R. 1924 Cal. 52 and 48 Cal. 184 (F.B.) Appl. (*Suhrawardy and Duval, JJ.*) NABIN CHANDRA BISWAS *v.* ABDUL AZIZ. **90 I.C. 998= A.I.R. 1926 Cal. 337.**

——The transfer of the whole or a part of an interest in non-transferable occupancy holding is operative against the tenant, whether it is made voluntarily or involuntarily, *e.g.*, in execution of a money-decree obtained against him, either by the landlord or by a stranger, 43 Cal. 148 Followed, (1 P.L.J. 257) and (2 P.L.J. 530) overruled. (*Dawson Miller, C. J.*) JUGESHWAR MISRA *v.* NATH KOERI. **65 I.C. 335= 1922 P.H. C.C. 49=A.I.R. 1922 Pat. 19. (F.B.)**

——Apart from custom or local usage the transfer for value of the whole or a part of an occupancy holding is operative as against the raiyat, whether it is made voluntarily or involuntarily. The sole landlord of a raiyat is competent to sell in execution of a money decree against the raiyat, his occupancy holding, whether the holding be or be not transferable by custom or local usage. (Case law fully discussed). 24 Cal. 355 overruled; 42 Cal., 172, partially overruled. (*Mookerjee, A.C.J., Fletcher, Chatterjee,) Teunon, Richardson, Chaudhuri and Shams-ul-Huda, JJ.*) CHANDRA BINODE KUNDU *v.* ALA BUX DEWAN.

48 Cal. 184=A.I.R. 1921 Cal. 15. (S.B.)

——*Landlord does not represent lessee.*

A mortgagee decree-holder purchased an occupancy holding in execution of his decree; it was already sold under a rent decree and bought by the landlord. The decree-holder got the sale set aside but did not make the lessees, from landlord parties to the proceedings. In a subsequent suit for posseession, *held* that the mortgagee decree-holder got no title against the lessees, who could not be represented by the landlord in the previous litigation. (*Teunon and Abdul Majid, JJ.*) ENDAJ ALI BISWAS *v.* ARJUN CHANDRA BISWAS. **62 I.C. 704 (Cal.)**

—Fractional share.

There can be no tenancy in respect of a fractional share of an occupancy field not defined by metes and bounds: 14 N.L.R. 62, Foll.: A.I.R. 1925 Nag. 124,

OCCUPANCY HOLDING—Grove.

Dist. (*Findlay, J.C.*) NAGO RAO *v.* MT. ALOOKHI. **104 I.C. 584=A.I.R. 1927 Nag. 351.**

—Grove.

After permission to plant grove is given to an occupancy tenant the tenant no longer remains an occupancy tenant. (*Daniels, J.*) GULZARI LAL *v.* HAR PRASAD. **85 I.C. 99=5 L.R.A. Rev. 260= A.I.R. 1925 All. 97.**

—Lease—Zarpeshgi.

———*Zarpeshgidar cannot ordinarily acquire occupancy rights.*

A Zarpeshgi lease is a transaction between debtor and creditor and not a transaction between lessor and lessee. Therefore the Zarpeshgidar is not entitled to claim occupancy right although there was letting of the land in the sense that the Zarpeshgidar was by the terms of the Zarpeshgi lease required to cultivate the lands and to pay yearly and nominal rent. (*Das and Ross, JJ.*) KHARAG NARAYAN *v.* DWARKA PRASAD SINGH. **78 I.C. 588=3 Pat. 465= A.I.R. 1924 Pat. 580.**

—Mortgage.

Plaintift's mortgaged their *sir* plots to defendants who continued in possession even after the proprietary title of the mortgagors was purchased by strangers who got the plots assessed by an action against both the parties. The mortgagors sued for redemption and possession.

Held, that the zamindar purchaser having treated the plaintiffs as exproprietary tenants, by getting rent assessed against the plaintiffs, the defendant cannot resist the claim of the mortgagors to take possession on payment of the mortgage money. (*Dalal, J.*) BISHESHWAR UPADHIA *v.* JAGADESHWAR PRASAD. **114 I.C. 186=10 L.R.A. Rev. 264= A.I.R. 1929 All. 231.**

———*Invalid.*

A mortgage of an occupancy holding is prohibited by law, but if the plaintiff-mortgagee succeeds in getting possession as mortgagee under an invalid mortgage he is entitled to have his possession protected as against everybody except the true owner. (*Walsh and Iqbal Ahmad, JJ.*) GANESH *v.* DASSO. **103 I.C. 428=25 A.L.J. 857=A.I.R. 1927 All. 669.**

———*Invalidity—Nature of.*

A mortgage of an occupancy holding is not permitted by law, but by entering into possession as mortgagees of the holding and by continuing in such possession for more than 12 years, the mortgagees can only prescribe a title for the limited interest of a usufructuary mortgagee but his possession is not adverse to the mortgagor, and if the mortgagor brings a suit for possession of the holding against the mortgagee within 12 years from the date of the execution of the mortgage the plaintift can claim an unconditional decree for possession on the ground that the mortgage being of an occupancy holding is void in law; but by the continuance of the defendants' possession for more than 12 years as usufructuary mortgagees there came into existence a legally operative mortgage which the plaintiffs must redeem as a condition precedent to a decree for possession of the holding. (*Iqbal Ahmed, J.*) MAHA MANGAL RAI *v.* KISHUN KANDU. **100 I.C. 346=A.I.R. 1927 All. 311.**

———*Usufructuary.*

A usufructuary mortgagee of occupancy holding is entitled to recover possession from the landlord unless the landlord can establish that after the execution of the usufructuary mortgage, the raiyat had abandoned the land, and therefore he can sue for a declaration that a sale of the holding was brought about by fraud: A.I.R. 1922 Cal. 135, Foll. (*Cuming and Chakravarti, JJ.*) HARI BARMAN *v.* KHATIJAN. **90 I.C. 737= A.I.R. 1926 Cal. 348.**

OCCUPANCY HOLDING—Mortgage.

———*T. P. Act, S. 68—Sub-mortgage,*

Where a mortgagor is himself holding a mortgage of occupancy tenancy and purports to make a sub-mortgage of his right, he is doing nothing forbidden by law and the sub-mortgagee can sue his mortgagor for money if the latter fails to put him in possession, 35 All. 405, Foll. (*Mukerji, J.*) RAM SARUP CHAUBE *v.* RAM DULAR PANDE. **87 I.C. 439= A.I.R. 1925 All. 736.**

———*Invalid.*

The mortgage of an occupancy holding is illegal. (*Sulaiman and Kanhaiya Lal, JJ.*) GANESH RAI *v.* BHUSHI RAI. **82 I.C. 324=46 All. 903= A.I.R. 1925 All. 69.**

———*Valid.*

A mortgage of a non-transferable holding is not invalid and does not confer any right on the landlord to have such mortgage declared invalid or not binding on the mortgagors: and where the landlord has acquired the interest of the mortgagors he is bound by the mortgage. (*Walmsley and B. B. Ghose, JJ.*) SAJEDAR RAHMAN *v.* RAKHEL CHANDRA ROY. **70 I.C. 71= A.I.R. 1924 Cal. 529.**

———*Agra Tenancy Act.*

Mortgage of an occupancy holding is not void if the mortgage had been executed before the passing of the Agra Tenancy Act of 1901. (37 All. 270, Ref.; 39 A. 539 Rel. on.) (*Daniels, J.*) RAM KARAN *v.* RAJA RAM. **84 I.C. 26=5 L.R.A. Rev. 225= A.I.R. 1924 All. 877.**

———*Purchase of.*

When a cosharer landlord takes an unlawful possession of the holding, another co-sharer pnrchaser of the holding is entitled to recover possession from him except to the extent of the share of the co-sharer.

A co-sharer landlord purchased a nontransferable occupancy in execution of a money decree. Subsequently another co-sharer landlord purchased the same holding in execution of his money decree and obtained possession:

Held: that the possession of the latter was wrongful and the former was entitled to recover possession of the holding except to the extent of the share of the latter: 42 Cal. 172 (F.B.); 26 Cal. 553 and 21 C.L.J 441, Ref.; A.I.R. 1924 P.C. 144, Expl. (*Suhrawardy and Garlick, JJ.*) GOLBAR BIBI *v.* ASWIN KUMAR. **117 I.C. 536=33 C.W.N. 161= A.I.R. 1929 Cal. 253**

—The Purchaser in a money decree against the tenant of a non-transferable occupancy holding takes only the tenant's interest, and so far as the landlord is concerned, obtains no interest or title. 8 Cal. 184, Expl. (*Suhrawardy and Graham, JJ.*) SUCKCHAND DAS *v.* GIRIDHARI DAS. **97 I.C. 1016= 44 C.L.J. 127=A. I.R. 1926 Cal. 1215.**

———*Re-entry on sale of.*

Where a raiyat of a non-transferable occupancy holding sells it to a third person and after obtaining a sub-lease from him remains in possession of the holding the landlord cannot obtain khas possession of it where relation to the landlord as such raiyat is not repudiated. (*Newbould and Rankin, JJ.*) MANMATHA KUMAR RAY *v.* JOSALA LAL PODDER. **77 I.C. 551= 28 C.W.N. 300=A.I.R 1924 Cal. 647.**

———*Execution Sale—Non-transferable—Sale by ordinary creditor is valid.*

An ordinary execution creditor can put up a non-transferable occupancy holding to sale in spite of the objections of the raiyat. 48 Cal. 184 Foll. 24 Cal. 335 Diss. (*Chatterjee and Cuming, JJ.*) KENARAM

OCCUPANCY HOLDING—Mortgage.

PAL *v.* KINU MANDAL. **75 I.C. 379= 50 Cal. 508=A.I.R. 1924 Cal. 52.**

———*Execution Sale.*

The law is now settled that a non-transferable occupancy holding can be sold in execution of a money decree. A.I.R. 1922 Pat. 114 ; 3 P. L. T. 205, Foll. (*Das and Kulwant Sahay, JJ.*) SURAJDEO *v.* PARTAP RAI. **75 I.C. 284=4 P.L.T. 405= 1923 P.H.C.C. 213=2 Pat. 739= A.I.R. 1923 Pat. 514.**

———*Sale of.*

Purchasers of a non-transferable occupancy holding acquire a good title as against the vendors, but do not acquire a title enforceable as against the landlords of their vendors. 42 Cal. 172 and A.I.R. 1921 Cal. 15 Foll. (*Mookerjee and Panton, JJ.*) ABDUL KADER SIRKAR *v.* LAL MAHOMED. **84 I.C. 25= 39 C.L.J. 581=A.I.R. 1921 Cal. 775.**

———*Plea by Co-sharer.*

A co-sharer landlord, as such, is entitled to raise a plea of non-transferability in a suit brought against him by the purchaser of a non-transferable occupancy holding for establishment of title and recovery of possession of the holding. (*Newbould, J.*) JADU NATH MANDAL *v.* RAI CHARAN KOYAL. **64 I.C. 186. (Cal.)**

———*Purchaser.*

The purchaser of a non-transferable occupancy holding who is recorded in the rent roll as being in possession merely does not acquire the status of tenant and is liable to ejectment. (*Newbould, J.*) BROJ GOPAL *v.* RAJANI KANTA GHOSE. **60 I.C. 473. (Cal.).**

—Possession.

———*Proof of right, to.*

Even where the collaterals of an occupancy tenant enter into possession and are entered in the jamabandi as occupancy tenants they have still to establish that they were entitled to succeed to the holding and rightly took possession thereof. The landlord cannot be called upon to prove the negative that the land was not occupied by the common ancestor. From their having taken possession of the land it cannot be inferred that they (collaterals) were entitled to do so. (*Zafar Ali, J.*) HARKAUR *v.* KHARGA. **102 I.C. 662=A.I.R. 1927 Lah. 534.**

—Rights of Court of Wards.

———*Creation by.*

It is doubtful whether the Court of Wards being a sort of trustees for the real owner, has a legal right to lessen that owner's rights by converting his private lands into ryoti lands and conferring occupancy rights on the occupiers. (*Wallace, J.*) LINGAYYA AYYAVARU *v.* GANGIAH. **104 I.C. 892= A.I.R. 1928 Mad. 58.**

—Rights of tenant.

———*Grove.*

The general rule applicable to stray trees growing on an occupancy holding does not apply to groves planted by tenants with the implied or express acquiescence of the Zemindars. Where land has been let to a tenant for the special purpose of planting a grove thereon or where a grove planted by a tenant has been allowed to exist unchallenged by the Zemindar the person who plants the grove acquires a transferable interest therein, and in the absence of a custom to the contrary the trees become his property. (*Kanhaiya Lal, J.*) MAN SINGH *v.* MADHO SINGH. **79 I.C. 599=22 A.L.J. 70=5 L.R.A. Rev. 34= A.I.R. 1924 All. 430.**

———*Trees.*

The trees on an occupancy holding, whether planted by the tenant himself or not, belong and attach to the occupancy holding, and there is no ground for drawing any distinction between the case of the mango trees and other trees. 10 All. 159 & 30 All. 134 Rel. on. (*Lindsay and Daniels, JJ.*) KAMPTA PRASAD *v.* SHEO PRASAD. **71 I. C. 971=21 A. L. J. 292= 45 All. 361=4 L. R. A. Rev. 86= A. I. R. 1923 All. 406.**

—'Sir' Land.

———*Devise of.*

Occupancy rights in *Sir* land can be devised by will along with the malguzari shares to which they appertain without the sanction of the Revenue authorities. F. A. No. 25 of 1918, Affirmed. (*Hallifax, A. J. C.*) GADI *v.* GOVINDA. **71 I.C. 207= A. I. R. 1923 Nag. 141.**

—Succession.

There is a distinction between a joint tenancy and a tenancy-in-common, the test being whether definite shares have been specified : and it is only in the case of a joint tenancy that the principle of survivorship applies, (*Broadway and Fforde, JJ.*) JAIKARAN *v.* NATHU RAM. **98 I. C. 339=7 Lah. 332= 27 P. L. R. 519=8 L. L. J. 425= A. I. R. 1926 Lah. 338.**

———*Adopted son.*

There are only two forms of adoption in the Punjab, *viz.*, adoption amongst agriculturists of the greater part of the province, which is strictly speaking not an adoption but merely the customary appointment of an heir, and adoption under the Hindu Law as practised in the south-east part of the Province (Punjab). In order that the adopted person may succeed to the occupancy land left by the adopter, the adoption must be under Hindu Law and, must comply with the requirements of that law as applicable to the parties concerned. (*Chevis, J.*) HIRA *v.* HARDAT SINGH. **68 I.C. 763=47 P.L.R. 1922= A.I.R. 1923 Lah. 26.**

—Transfer.

———*Proprietor.*

Where the occupancy right of a tenant is transferred to a fractional proprietor, although no occupancy right can vest in the fractional proprietor, he still acquires a separate interest in the raiyati holding paying to his co-proprietors their share of the rent. (*Dawson Miller, C. J, and Foster, J.*) GOBI SINGH *v.* JAGDES SINGH. **102 I.C. 386=8 P.L.T. 69= A.I.R. 1927 Pat. 172.**

—Transfer of holding.

———*Legality.*

The defendant borrowed money from the plaintiff's father and executed a bond agreeing to repay it on a certain date. There was a further condition that if the money was not repaid on that date the creditor could enter into possession of the plaintiff's cultivatory holding as a usufructuary mortgagee.

Held : that the whole contract is not illegal within S. 24 of the Contract Act. and that the plaintiff could get money decree. 35. I. C. 202 Foll. (*Walsh and Kanhaiya Lal, JJ.*) JARBHANDAN *v.* BADRI NARAIN. **83 I.C. 19=45 All. 621=21 A.L.J. 480= 4 L.R.A. Civ. 581=A.I.R. 1924 All. 80.**

———*Landlord—Effect of.*

The plaintiffs and defendant were co-sharers in a taluk which comprised the disputed lands as an occupancy holding. The first plaintiff purchased the occupancy holding in execution of a mortgage decree. *Held* that the legal effect of this purchase was that the holding ceased to exist as an occupancy holding in the hands of the plaintiff as co-sharer landlord and the plaintiff held the land as non-occupancy raiyat. (*Mookerjee and Chotzner, JJ.*) ABINASH CHANDRA

OCCUPANCY HOLDING—Miscellaneous.
BHATTACHARJEE *v.* AMAR CHANDRA DE.
70 I.C. 328=27 C.W.N. 760.
—Miscellaneous.
——*Acquisition under Land Acquisition Act—Landlord—Compensation.*
When occupancy lands are acquired the landlord is entitled to some compensation, if there is no custom of transferability without consent of the landlord or if within the next 20 years, the landlord could have enhanced the rent of the lands. (*Das and Adami, JJ.*) AGHORI KOERI *v.* KISHUNDEO NARAYAN.
88 I. C. 397=3 Pat. L. R. 111=6 P. L. T. 797= A. I. R. 1926 Pat. 16.
—*Watan lands.*
The tenure of the watan lands is quite different from the tenure of the occupancy lands : A. I. R. 1923 P. C., 205, Dist. (*Stuart C. J. and Misra, J.*) SHEO NANDAN *v.* HIRA LAL. **92 I. C. 247= 13 O. L. J. 6=A. I. R. 1926 Oudh 226.**

OCCUPANCY RIGHTS.
See OCCUPANCY HOLDING.

OCTROI.
See U. P. ACT (I OF 1900).

OFFENCE.
See (1) LOCAL ACTS,
(2) PENAL CODE.

OFFER.
See CONTRACT ACT, S. 2.

OFFICER.
—Bad motive.
If an officer has a power, the fact of his using it from a bad motive does not invalidate the exercise of that power. (*Fawcett and Mirza, JJ.*) SHIVBAT *v.* EMPEROR. **109 I. C. 487=52 Bom. 238= 30 Bom. L. R. 392=29 Cr. Lom. J. 551= 10 A. I. Cr. R. 308=A. I. R. 1928 Bom. 162.**

OFFICIAL ACTS.
See EVIDENCE ACT, S. 114.

OFFICIAL ASSIGNEE.
See (1) INSOLVENCY ACT,
(2) PRES. TOWNS, INS. ACT.

OFFICIAL RECEIVER.
See (1) INSOLVENCY.
(2) PROV. INS. ACT.

OFFICIAL TRANSLATION.
See EVIDENCE ACT, S. 86.

OFFICIAL TRUSTEES ACT (2 of 1913).
—S. 4—Guardian.
Under the Official Trustees Act, the Official Trustee is a Government officer appointed by Government and liable, under the provisions of S. 16 of the General Clauses Act, to be removed by Government. The Official Trustee as such should not be appointed the guardian of the property of a minor. (*Rangnekar, J.*) OMAR TYAB *v.* ISMAIL TYAB. **108 I.C. 495= 30 Bom. L.R. 177=A.I.R. 1928 Bom. 69.**

ONUS OF PROOF.
See EVIDENCE ACT, S. 101.

OPINION—Evidence.
See EVIDENCE ACT, SS. 45, 51.

OPIUM ACT (1 of 1878).
—Procedure.
For complaints under the Abkari Act or under the Opium Act (1 of 1878), the ordinary Criminal Procedure Code, is not applicable, but the procedure contained in those Acts is to be strictly followed ; and as complaints by private persons are not provided for by the procedure in those Acts, they must be treated as not properly instituted : A.I.R. 1923 Mad, 339 and 25 M.L.J. 577, Rel. on. (*Odgers J.*) LAZAR FERNANDO *v.* AMIRTHAM FERNANDO, **119 I.C. 174=**

OPIUM ACT (1878), S. 9—Joint possession.
52 Mad. 613=2 M. Cr. C. 168= 30 M.L.W. 112=1929 M.W.N. 507= 30 Cr. L.J. 1011=1929 Cr. C. 78= A.I.R. 1929 Mad. 604=57 M.L.J. 214.
——There is no essential difference between the procedure under the Abkari Act and the Opium Act. (*Odgers, J.*) LAZAR FERNANDO *v.* AMIRTHAM FERNANDO. **119 I.C. 174=52 Mad. 613= 2 M. Cr. C. 168=30 M.L.W. 112= 1929 M.W.N. 507=30 Cr.L.J. 1011= 1929 Cr. C. 78=A.I.R. 1929 Mad. 604= 57 M.L.J. 214.**
—S. 3—Morphia.
Morphia is an alkaloid prepared from the poppy and is an intoxicating drug and comes within the definition of Section 3 of Opium Act. 1 Lah. 443 : distinguished and dissented from. (*Shadi Lal, C. J. and Moti Sagar, J.*) EMPEROR *v.* C. J. ROBINSON. **68 I.C. 612=3 Lah, 230= 23 Cr.L.J. 580=A.I.R. 1922 Lah. 216.**
——*Morphia* is not included in the definition of opium under the Act and the sale or transport of *Morphia* without a license, though contrary to the rules, is not an offence under the Act. (*Martineau, J.*) SITARAM *v.* EMPEROR. **69 I.C. 40=1 Lah. 443= 22 Cr.L.J. 8=2 Lah. L.J, 711.**
—S. 5—Keeping of accounts—Rules.
Where a person to whom a license has been granted for selling opium omits to write up the accounts as soon as the transactions of each day are over he commits a breach of Rule 25 framed by Local Government of Oudh under S. 5 of Opium Act, and is liable to punishment under S. 9 (*g*) of the Act. (*Dalal A.J,C,*) HAZARI *v.* KING-EMPEROR. **89 I.C. 250=12 O.L.J. 283=2 O.W.N. 303= 26 Cr. L.J. 1306=A.I.R. 1925 Oudh 350.**
—S. 9—Authorised agent.
An authorised agent of a retail vend licensee is authorised to keep opium under his license in his vend premises to the extent allowed by the license, and if the amount found is not beyond the limit of his license, conviction cannot stand. 41 P. R. 1917 (Cr.) Foll. (*Wilberforce, J.*) DUNI CHAND *v.* EMPEROR. **66 I.C. 993=3 L.L.J. 49=A.I.R. 1921 Lah. 169.**
—S. 9—Interpretation.
The word " preparation " designates a completed or manufactured article and not an article in process of manufacture, the test being whether the stage has been reached at which it can be used. The word " admixture " refers only to a completed article and can only be applied after the mixing has been finished, and not earlier. The articles designated by both words only come within the scope of their respective definitions when they have been prepared or mixed as the case may be. (*Harrison, J.*) MT. HAMIRI *v.* THE CROWN. **73 I.C. 700=4 Lah. 12= 24 Cr. L.J. 668=A.I.R. 1924 Lah. 99**
—S. 9—Joint possession.
If it is proved that a person is in possession on behalf of others as also of himself of opium the total quantity of which is less than all the joint owners are entitled to possess he would not be guilty of any offence.
Two persons were found in possession of 9 mashas of chandu, the amount allowed by law to each person being 6 mashas *i.e.* they were in joint possession of less than the two of them could have held separately.
Held : that neither of them could be convicted of an offence under Opium Act : 34 *P. R.* 1905 *Cr.* and 31 *P. R.* 1902 *Cr. Rel. on* ; 10 *P. R.* 1901 *Cr. Ref* ; 13 *P. R.* 1897 *Cr. Dist.* (*Shadi Lal, C.J.*)

OPIUM ACT, (1878)—Joint possession.

ZANIN KHAN *v.* EMPEROR. **121 I.C. 292=31 Cr.L.J. 240=31 P.L.R. 140=A.I.R.1930 Lah. 342.**

———Two brothers were the joint owners of the shops from which illicit opium was recovered. The elder brother had had possession of opium under a license previously.

Held: that the presumption might safely be made that the possession of the opium was that of the elder brother and that the younger brother should not be held guilty, (*Broadway, J.*) NAND LAL *v.* CROWN. **88 I.C. 1044=6 Lah. 311=26 P.L.R. 493=26 Cr. L.J. 1268=A.I.R. 1925 Lah. 477.**

—S. 9—Mistake in register.

Neither the rules nor the terms of a license provide for any penalty against the authorised agent in respect of a mistake in the register. 29 Cal. 606. Foll. (*Wilberforce J.*) DUNI CHAND *v.* EMPEROR. **66 I.C. 993=3 L.L.J. 49=A.I.R. 1921 Lah. 169.**

—S. 9—Offence.

Accused convicted for having possessed opium in excess of quantity shown in the stock register and hidden in the premises—Cakes of opium supplied by the treasury proved to be often of overweight—Excess cannot be assumed to be due to selling under weight—Conviction was set aside. (*Mukerji, J.*) NARAYANCHANDRA *v.* EMPEROR. **112 I.C. 901=11 A.I.Cr. R. 400=30 Cr. L.J. 37=A.I.R. 1928 Cal. 324.**

———*Scope of.*

While a contravention of the rules is punishable as an offence under Section 91 a contravention of the conditions of the permit is not penal. The only penalty for such a contravention is the cancelment of the license and the forfeiture of the money paid in pursuance of the license. 26 Cal. 571 Foll. (*Kanhaiya Lal, A.J.C.*) MAIKULAL *v.* EMPEROR. **64 I.C. 135=22 Cr. L.J. 743=24 O.C. 235=A.I.R. 1921 Oudh 143.**

—S. 9—Possession.

———*Temporary custody—If amounts to,*

Mere temporary custody does not amount to possession within the meaning of S. 9 (e) of the Opium Act. (*Findlay, J.C.*) RAM LAL LODHI *v.* EMPEROR. **117 I.C. 212=30 Cr. L.J. 727.**

———The term "possession" implies knowledge on the part of the alleged possessor, and before the accused person is required to account for opium there must be proof that such opium has been in his possession or under his control: (1872-92) L.B.R. 573, Foll. (*Maung Ba, J.*) SHWE KYO *v.* EMPEROR. **117 I.C. 248=7 Rang. 11=30 Cr. L.J. 753=A.I.R. 1929 Rang. 121.**

———*What is.*

Possession of opium—Prosecution must prove possession by satisfactory evidence. (*Young, J.*) MA MI *v.* KING-EMPEROR. **75 I. C. 358=2 Bur. L. J. 16=24 Cr. L. J. 934=A. I. R. 1923 Rang. 152.**

———Where the petitioner's cook room which was the place in which opium was found was such that several persons had equal right of access thereto,

Held that the petitioner could not be convicted of illegally possessing opium. (*Das, J.*) KASHIRAM MEHARAY *v.* EMPEROR. **66 I. C. 328=3 Pat. L. T. 132=23 Cr. L. J. 264=A. I. R. 1922 Pat. 387.**

———The mere fact that a passenger by boat has contraband opium with him places no liability on the boatman to give any satisfactory account of the opium; more especially where the prosecution evidence shows that it was the passenger who had the opium; the boatman, in such a case cannot be convicted under S. 9 (c) of the Opium Act. (*Chatterjee and Cuming, JJ.*) MUKBUL ALI *v.* EMPEROR. **59 I. C. 133=22 Cr. L. J. 21 (Cal.)**

—S. 9—Smuggling.

Where a person under a pretended name consigned from Kotah, a native state, into Cawnpore in British India, bags of maize containing a considerable quantity of opium which was detected at Cawnpore and searched in his presence,

Held: that the offence under S. 9 was committed. (*Walsh and Ryves, JJ.*) GOBIND RAM *v.* EMPEROR. **81 I. C. 100=46 All. 146=5 L. R. A. Cr. 46=A.I.R. 1924 All. 558=25 Cr. L. J. 612.**

—S. 9—Sugar-mixed pills.

Mere preparation of sugar-mixed opium pills is no offence though prepared with intent to sell. (*Harrison, J.*) JIWNA RAM *v.* THE CROWN. **81 I. C. 154=6 L. L. J. 206=25 Cr. L. J. 666=A. I. R. 1924 Lah. 529.**

—S. 11—Procedure—Owner.

Improper conduct of owner of the vessel—Neither imputed nor proved—He should be given opportunity to be heard before confiscation of vessel. (*Sanderson, C. J. and Pearson J.*) MOHAMAD KESHAB *v.* EMPEROR. **91 I. C. 703=30 C. W. N. 240=27 Cr. L. J. 127=A. I. R. 1925 Cal. 1021.**

———*Owner.*

An order confiscating the conveyance under S. 11 should not be passed without giving an opportunity to the alleged owner to prove that he did not know and had no reason to believe that opium was transported in the conveyance in question. (*Das, J.*) MANGHAN DAS *v.* RAHIM BUX. **69 I. C. 635=1 Pat. L. R. Cr. 32=2 P L. T. 63=A. I. R. 1921 Pat. 232.**

—S. 12—Scope of.

The jurisdiction conferred on the Magistrate under S. 12 is a special jurisdiction and is not limited, in any way, by the Code of Criminal Procedure. Under the section a Magistrate, who has power to order confiscation has also the power to give the owner of the thing liable to be confiscated an option to pay in lieu of confiscation such a fine as the officer thinks fit even exceeding his jurisdiction under Cr. P. Code. (*Das, J.*) MANGHAN DAS *v.* RAHIM BUX. **69 I.C. 635=1 Pat. L. R. Cr. 32=2 P.L.T. 63=A.I.R. 1921 Pat. 232.**

—S. 14—Procedure.

———*Seizure.*

Under Ss. 14, 15 and 16 it is only search that has to be carried out in accordance with the rules for searches under Cr.P. Code, and the rules have no bearing on seizures. (*Baguley, J.*) MAUNG SAN MYIN *v.* EMPEROR. **121 I.C. 715=7 Rang. 771=31 Cr. L.J. 303=A.I.R. 1930 Rang. 49.**

———The provisions of S. 103 of the Cr.P. Code, are applicable to searches made under S. 14 of the Opium Act, but not to searches in an open place under the provisions of S. 15. (*Mya Bu, J.*) KALI KUMAR DE *v.* KING.EMPEROR. **100 I.C. 980=6 Bur. L.J. 11=28 Cr. L.J. 372=7 A.I. Cr. R. 549=A.I.R. 1927 Rang. 170.**

—S. 90—Meaning of possession.

Possession implies knowledge, and there would be no possession when there is no knowledge on the part of the ostensible occupant of the cabin or room as the case may be. Possession without knowledge can hardly have been meant since in that case the

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element of criminal intention or knowledge would be entirely wanting.

Where there is undoubtedly ground for grave suspicion regarding possession against the accused, but the element of reasonable doubt is not excluded, it would not be safe to conclude that the accused had the knowledge which is necessary to convict him of the offence. The *onus* of proving that knowledge is upon the prosecution, and relying solely upon the bare fact that the opium was found in the accused's cabin without proof of any additional or extraneous facts to establish any connexion between him and the opium is not sufficient to discharge that onus. (*Graham and Panckridge, JJ.*) CYRIL C. BAKER *v.* EMPEROR. **A.I.R. 1930 Cal. 668.**

ORAL EVIDENCE, ADMISSIBILITY.

See EVIDENCE ACT, S. 92.

ORIGINATING SUMMONS.

See CALCUTTA HIGH COURT RULES.

ORISSA TENANCY ACT (II of 1913).

—S. 5—Tenure holder.

Where the area held by a tenure-holder exceeds 33 acres or 100 bighas, the presumption is, under S. 5 (5) of the Bengal Tenancy Act and the same section of the Orissa Tenancy Act, that his interest is that of tenure-holder until the contrary is shown: and the presumption applies to all cases whether the interest was created before or after the Act was passed. (*Dawson Miller, C. J. Mullick, Das, Kulwant Sahay and Jwala Prasad, JJ.*) BALUNKI ROUT *v.* SRI KUNJA BEHARI DEB. **105 I.C. 633 = 6 Pat. 698 = 9 P.L.T. 72 = A. I. R. 1927 Pat. 209 (F.B.)**

—S. 31—Civil Court.

Civil Court has no power to enter upon the question as to the correctness of the order of the Revenue Court having jurisdiction. 2 P. L. T. 476, Ref: (*Das and Ross, JJ.*) BUDANATH PRIDA *v.* RADHABINODE NAIK. **112 I.C. 276 = 7 Pat. 462 = 9 P.L.T. 787 = A.I.R. 1928 Pat. 465.**

—S. 31—Right of landlord—Origin.

The landlord's right to have the transfer registered and the fee paid is based on S. 31 of the Orissa Tenancy Act and not upon custom and therefore the plea that there was no custom in Orissa for mutation of names by depositing one-quarter of the consideration when an occupancy holding was transferred, is untenable. (*Dawson Miller, C. J. Mullick, Das, Kulwant Sahay and Jwala Prasad, JJ.*) BALUNKI ROUT *v.* SRI KUNJA BEHARI DEB. **105 I.C. 633 = 6 Pat. 698 = 9 P.L.T. 72 = A.I.R.1927 Pat. 209 (F.B.)**

—S 31—Transfer without consent.

In the case of a private sale of occupancy holding outside a permanently settled estate, if the landlord has not consented or is not deemed under the statute to have consented, the transfer of occupancy holding is not valid against him and the transferee is not his raiyat but a trespasser. The procedure under sub-Ss. 1 to 3 is a concession designed to facilitate the securing of that consent by a diligent purchaser, and when an exceptional procedure is conceded to the transferee whereby he may obtain the consent of the landlord which might otherwise not have been forthcoming, he must comply strictly with the procedure: 2 P. L. J. 476, Diss. from: 4 P.L.J. 294, Dist. and held no longer good law in view of A. I. R. 1922 Patna 114 (F. B.). (*Kulwant Sahay and Macpherson, JJ.*) UCHHAB JENA *v.* UPENDRA NAIK. **103 I.C. 461 = 6 Pat. 350 = A.I.R. 1928 Pat. 173.**

———A purchase of a non-transferable holding without the consent of the co-sharer landlords is not a

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tenant of the latter, and any one of them is entitled to eject him from the holding to the extent of his own share in the holding: 10 C.L.J. 618 and 21 C.L.J. 441, Rel. on. (*Kulwant Sahay and Macpherson, JJ.*) UCHHAB JENA *v.* UPENDRA NAIK. **103 I.C. 461 = 6 Pat. 350 = A.I.R. 1928 Pat. 173.**

—S. 57—Occupancy tenancy—Custom.

An under-raiyat by custom may acquire certain privileges of occupancy tenants and it may be that one of these privileges is that he is not entitled to be ejected merely on notice under S. 57. But he could not by custom acquire the status of occupancy tenant. (5 Pat. L.J. 373, Foll.) (*Das and Adami, JJ.*) RAGUNATH MISRA *v.* RAM BEHERA. **75 I.C. 427 = 1 Pat. 167 = 5 P.L.T. 140 = A.I.R. 1922 Pat. 548.**

—S. 117—Rafa tankidars.

The nature of the Rafa-tankidari interest is a question for determination in each case and they cannot be classed as a whole either as tenures or as raiyati holdings.

The status of Rafa-tankidars in the particular case was that of tenure holders and the tenants under them were occupancy raiyats.

In 1838 during the resumption proceedings by the British Government a compromise was entered into between some of the Tankidars and the Government to the effect that on condition of their agreeing to pay rent at a certain fixed rate no enquiry would be made as to the liability of their interests to be resumed. The rates so fixed were known as Rafa-tanki, or compromise quit-rents, and the holders of these lands came to be known as Rafa-tankidars. In many cases Rafa-tankidars belonged to the raiyati class, but this in itself is not sufficient to show that their interests were necessarily those of raiyats rather than tenure-holders. 1 Pat. 167, A. I. R. 1922 Patna 548. Overruled. (*Dawson Miller, C. J., Mullick, Das, Kulwant Sahay and Jwala Prasad, JJ.*) BALUNKI ROUT *v.* SRI KUNJA BEHARI DEB. **105 I.C. 633 = 6 Pat. 698 = 9 P.L.T. 72 = A.I.R. 1927 Pat. 209 (F.B.)**

—S. 193—Scope of.

———*Purchaser.*

A suit for khas possession against a purchaser of a non-transferable tenure without the consent of the landlord is cognizable in a civil Court. A suit of this nature is not a suit contemplated or provided for in the Orissa Tenancy Act, and S. 193 of the Act does not apply to such a suit. (*Kulwant Sahay and Macpherson, JJ.*) SECRETARY OF STATE *v.* NALABAR MANGRAJ. **103 I.C. 435 = 6 Pat. 358 = A.I.R. 1927 Pat. 254.**

———*Tenant at half rate.*

Where there was a grant in perpetuity to the ancestor of the defendant at half rent to be held during good behaviour and the settlement khatians of 1905 and 1920 described the status of the defendant as that of a tenure-holder and the settlement kewat of 1920 described the tenures as non-transferable interest resumable for mis-behaviour,

Held: that the status of the defendant is that of a tenure-holder. The relation between the parties must be governed by the provisions of the Orissa Tenancy Act, and the suit as against the defendant for possession was cognizable by the Collector and not in the Civil Court. (*Kulwant Sahay and Macpherson, JJ.*) SECRETARY OF STATE *v.* NATABAR MANGRAJ. **103 I.C. 435 = 6 Pat. 358 = A.I.R. 1927 Pat. 254.**

—S. 227—Setting aside sale.

An application under S. 227 (3) of the Orissa Tenancy Act for setting aside a sale on the ground

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that the holding was purchased by the judgment-debtor himself through another person is not an application under S. 47 of the Code of Civil Procedure, and the proper article applicable is Art. 181 and not Art. 166 of the Limitation Act: 38 I.C. 209, Foll.; A.I.R. 1925 Cal. 351, Diss. from. (*Kulwant Sahay and Macpherson, JJ.*) ANILA CHARAN PADHAN *v.* NIMAI BAHUBALENDRA. **101 I.C. 564=8 T.L.J. 186=6 Pat. 366=A.I.R. 1927 Pat. 177.**

—S. 236—Under tenant.

———*Homestead land.*

Section 236 applies to an under-tenant of homestead land, whereby he is not liable to ejectment on mere notice to quit. 21 Cal. L. J. 478, followed. *(Das and Adami, JJ.)* KANDURI SAHU *v.* ARJUN SAHU. **70 I.C. 356=1 Pat. 161=A.I.R. 1922 Pat. 416.**

OUDH CHIEF COURT RULES (CIVIL RULES.)

—Ch. 13, R. 1, cl. 2—Valuation and jurisdiction.

Valuation determining jurisdiction is the valuation by plaintiff for the purpose—Appeals above Rs. 500 are triable by a Bench of two Judges. (*Misra, J.*) MOHAMMAD SIDDIQUE KHAN *v.* RISALDAR KHAN. **95 I.C. 127=A.I.R 1926 Oudh 479.**

—R. 68—Principle.

———*C. P. Code, O. 17, R. 1—Costs on adjournment.*

The principle which the Court awarding the costs should always bear in mind is that it should order the payment of a sum commensurate with the costs, which in the opinion of the Court the party ready to proceed will have to incur owing to the adjournment. The amount to be awarded should not be one of the nature of penalty or of punishment. It is this very principle that is underlying R. 68, Oudh Civil Rules, which deals with the costs of adjournment. (*Misra, J.*) GAJENDRA SHAH *v.* RAM CHARAN. **121 I.C. 894=7 O.W.N. 197=4 Luck. 529=A. I. R. 1930 Oudh 171.**

—R. 190—Ancestral property.

Village forming part of an estate as defined in the Oudh Estates Act 1869, is ancestral land within the definition of the term as given in R. 190 (b) only so long as the property continues to be governed by the provisions of the Oudh Estates Act. The property must be considered to form an estate or part of an estate as defined in the Oudh Estates Act so long as the property continue to be governed by the Oudh Estates Act but it cannot be considered to be such estate or a part of an estate when it ceases to be governed by that Act. (*Wazir Hasan and Srivastava, JJ.*) MUHAMMAD USMAN KHAN *v.* BANKEY LAL. **6 O.W.N. 759=A.I.R. 1929 Oudh 467.**

—R. 277—Failure to deposit.

An order adjudicating a person an insolvent cannot be annulled for failure to deposit costs of publication under S. 30 of the Provincial Insolvency Act V of 1920. Where costs are not deposited the only remedy for the Court is under R. 277 (3) to recover the costs from the insolvent's property if the property is sufficient for the purpose, or to remit the costs, if the property is insufficient. (*Stuart, C. J. and Raza, J.*) HAR KISHORE *v.* MASUM ALI KHAN. **6 O.W.N. 1093=A.I.R. 1930 Oudh 53.**

—R. 289—Letters of administration.

———*Trial as suit.*

Full fee should be allowed in case where grant of letters of administration is asked for and opposed. Succession Act, S. 295. (*Raza and Srivastava, JJ.*) T. NATHON *v.* MRS. A. S. NATHAN. **123 I.C. 220=7 O.W. N. 373=A.I.R. 1930 Oudh 272.**

OUDH CIVIL DIGEST, (1912)—Para 115—Certificate by munsarim.

—CRIMINAL.

—Ch. 5, R. 14—Irregularity.

No objection was taken to the original selection of the jurors, eight of whom were present in the Court, and instead of conducting a second ballot, as required by R. 14, Ch. 5. Oudh Criminal Rules, the Judge chose five out of the eight present. The Judge asked the accused whether they had any objection to this selection but they had none,

Held: that the irregularity was covered by S. 537, Cr. P. Code, and did not vitiate trial: 8 Cal. 739, Foll.; 33 All. 385, Not. Foll. [But see A.I.R. 1927 Cal. 242.] (*Raza and Pullan, JJ.*) RAM ADHIN *v.* EMPEROR. **114 I.C. 814=6 O.W.N. 97=30 Cr. L.J. 384=A.I.R. 1929 Oudh 154.**

OUDH CIVIL COURTS ACT (XIII of 1879).

—S. 16—District boundaries.

It is for the executive authorities to determine the district boundaries and when these are determined the Civil Court accepts these boundaries. (*Raza and Pullan, JJ*). KAMALAKANT PRASAD SINGH *v.* NAGESHAR PRASAD SINGH. **111 I.C. 471 (Oudh.)**

—S. 17—Valuation of Suit.

———*Subject-matter.*

Where the plaintiffs brought a suit for possession of a half share in a house either by partition or by a decree for joint possession and the defendant had purchased the house for Rs. 215 at a Court sale but the plaintiff valued the suit at Rs. 300 for purposes of jurisdiction and the defendant contended that he had built a *pucca* house after pulling down the house purchased by him at the Court sale and prayed that if a decree for possession was passed in plaintiffs' favour compensation must be given to him as his new house was of considerable value and it was discovered that the value of the house was over Rs. 2,000.

Held, the subject-matter of the suit was the value of half a share in the house as it was when the defendant purchased it, and that the house built by the defendant was not part of the subject-matter of the suit within the meaning of Sec. 17 of the Oudh Civil Courts Act, and therefore the suit was not undervalued. (*Dalal, J.C.*). ABDULLAH *v.* MAHAMMAD NAZIR. **80 I.C. 694=A.I.R. 1925 Oudh 163.**

—S. 18—Appeal.

An order under C. P. Code O. 21, R. 71 is not a separate proceeding. Though the amount involved in the order may be less than Rs. 5,000 if the suit out of which the proceeding arises is of the value of more than Rs. 5,000, the appeal lies to the Judicial Commissioner and not to the District Judge. (*Daniels, J.C.*). ANGNER *v.* NAWAB MIRZA MOHAMMED SAJJAD ALI KHAN. **88 I.C. 131=12 O.L.J. 261=2 O.W.N. 212=28 O.C. 327=A.I.R.1925 Oudh 397.**

—S. 37—Redemption Suit.

A claim to redeem a mortgage of 1795 can only succeed if it is shown that the instrument of mortgage had fixed a term within which the property comprised might be redeemed and the term had not expired before 15th February 1856. (*Stuart, C.J. and Raza, J.*). SARDAR SINGH *v.* GANGA BAKSH SINGH. **106 I.C. 363=2 Luck. 437=6 O.W.N. 1243=A.I.R. 1928 Oudh 20.**

OUDH CIVIL DIGEST, (1912,)

—Para. 115—Certificate by munsarim.

The certificate as to whether service was sufficient or not, under O. 5, R. 23, C.P. Code if signed by the *munsarim* and not by the presiding officer of the Court, is neither legal nor of value. (*Dalal, A. J. C.*) MATHURA SINGH *v.* SHEO MOHAN PRASAD. **74 I.C. 792=10 O.L.J. 337=A.I.R. 1924 Oudh 237**

OUDH CIVIL DIGEST, (1912)—Para 172—Fees of pleaders.

—Para 172—Fees of Pleaders.

Filing of *vakalatnama* before date of hearing by one pleader and the conducting of appeal by another does not disentitle the party to full fees. (*Daniels and Lyle, A. J. Cs.*) RAGHU INDRA PRATAP SAHI *v.* SAIYED ABU JAFAR. **70 I.C. 99=25 O.C. 279=A.I.R. 1923 Oudh 55.**

—Para 172—Jurisdiction.

Where a Court in which a decree has been transferred for execution makes an order for partial execution but does not send to the Court passing the decree, the certificate of execution under C. P. Code, S. 41 and where there is still scope in the former Court for the satisfaction of the decree, it is not divested of its jurisdiction until it sends the certificate of execution under C. P. Code, S. 41. (*Dalal, J. C.*) SYED MAHAMMAD SHAKIR *v.* JUGAL KISHORE. **85 I.C. 455=28 O.C. 169=A.I.R. 1925 Oudh 492.**

—Para 272—Applicability.

Only cases decided on confession of judgments made at once are governed by Cl. 7, Para. 272 and not cases in which there has been some contest. Pleader's fees should be charged at the full scale under Cl. 6 if the case has reached the stage of framing of issues. (*Wazir Hasan, A. J. C.*) BALDEO SINGH *v.* JAI SINGH. **80 I.C. 504=27 O.C. 265=A.I.R. 1925 Oudh 139.**

—Para 272—Execution proceedings.

——*Fees.*

The intention of the rule is that the fee fixed for the case should cover execution proceeding also whether an objection is filed by the judgment-debtor or not. (*Daniels, J. C.*) SWAMI DAYAL *v.* MAQSOOD HUSAIN. **88 I.C. 141=A.I.R 1926 Oudh 39.**

OUDH COURTS ACT (U.P. IV of 1925.)

—S. 7—Scope.

——*Ordinary original jurisdiction.*

Though it may be conceded that according to S. 7 the Chief Court of Oudh has original jurisdiction in civil matters over certain classes, yet it cannot be considered to be Court of "ordinary" original civil jurisdiction as required by S. 195 (3), Cr. P. Code, because jurisdiction conferred by S. 7 is not an "ordinary" original civil jurisdiction. (*Wazir Hasan, J.*) PANCHU *v.* JUMMAN. **121 I.C. 90=6 O.W.N. 848=1929 Cr.C. 589=31 Cr.L.J. 205=A.I.R. 1929 Oudh 515.**

—S. 11—Authority of rules.

The Oudh Chief Court has authority to fix the period of limitation under the provisions of S. 11, Local Act IV of 1925; for presenting an application for a declaration under S. 12 and the rule so framed when approved by the Local Government and published in the Official Gazette has the same authority as a rule contained in Sch. 1, C. P. Code. (*Stuart, C. J. and Raza, J.*) MT. BRAJ RANI *v.* SEBLA DIN. **106 I.C. 496=3 Luck. 145=4 O.W.N. 1173=A.I.R. 1928 Oudh 108.**

—S. 12—Certificate when granted.

A certificate for further appeal may be granted if the decision for which a further appeal is proposed to be preferred is: (1) opposed to any general principle of law; or (2) it involves a question of public interest; or (3) is contrary to any recognized precedent. (*Hasan, J.*) USUF ALI BEG MIRZA *v.* NATHU. **96 I.C. 325=1 Luck. 443=3 O.W.N. 574=A.I.R. 1926 Oudh 419.**

——Where the second Appellate Court sets aside the lower Court's judgment on the ground that it was no judgment in law, certificate cannot be granted. (*Misra, J.*) BISHESHWAR DAYAL *v.* LACHMAN RAM.

OUDH COURTS ACT, (1925)—S. 40—Applicability. 96 I.C. 939=1 Luck. 483=3 O.W.N. 576=A.I.R. 1926 Oudh 415.

——Question as to interpretation of document—Certificate cannot be granted. (*Misra, J.*) BISHESHWAR DAYAL *v.* LACHMAN RAM. **96 I.C. 939=1 Luck. 483=3 O.W.N. 576=A.I.R. 1926 Oudh 415.**

——Cases in which there may be involved questions of public importance or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not measurable in money, it is of great public or private importance, are fit ones for certificate under S. 12 (2). (*Misra, J.*). BISHESHWAR DAYAL *v.* LACHMAN RAM. **96 I.C. 939=1 Luck. 183=3 O.W.N. 576=A.I.R. 1926 Oudh 415.**

—S. 12—Limitation.

An application for a declaration that an appellate decree made by a single Judge of the Chief Court in second appeal is a fit decree for appeal to a Bench consisting of two Judges, is time-barred if presented more than thirty days after the date of the judgment under R. 7, Ch. 12, Oudh Chief Court Rules, though the rule allows discretion for the admission of such an application to grant further time if good cause is shown for its presentation. (*Stuart, C.J. and Raza, J.*) MT. BRAJ RANI *v.* SIBTA DIN. **106 I.C. 496=3 Luck. 145=4 O.W.N. 1173=A.I.R. 1928 Oudh 108.**

—S. 12—Scope.

The right of third appeal conferred under S. 12 (2) of the Act is not wider than that conferred upon a litigant under the provisions contained in Letters Patent of a High Court. Under S. 12 (2) the intention of the legislature is to curtail the right of appeal. (*Misra, J.*) BISHESHWAR DAYAL *v.* LACHMAN RAM. **96 I.C. 939=1 Luck. 483=3 O.W.N. 576=A.I.R. 1926 Oudh 415.**

—S. 12—Scope of arguments.

Where a case is declared to be a fit one for appeal under S. 12, sub-S. (2) the appellant is entitled to argue the appeal on all the points taken in the appeal and is not confined to the points considered by the Judge certifying the fitness. (*Raza and King, JJ.*) MAHMUDUL HASAN *v.* BALDEO SINGH. **100 I.C. 851=A.I.R. 1927 Oudh 188.**

—S. 12—Second appeal.

No appeal lies from an order under O. 41, R. 23, C. P. Code, passed by a single Judge of the Appellate Court in exercise of his appellate jurisdiction. (*Stuart, C.J., and Wazir Hasan, J.*) MAHABIR *v.* MT. MITHAN. **123 I.C. 853=6 O.W.N. 1011=A.I.R. 1930 Oudh 195.**

—S. 12—Test for certificate.

The test to be applied in granting leave to appeal should be whether the question involved is one of public importance or of some such importance that the grievance complained of caused by the decree passed in appeal is not measurable in money: A.I.R. 1926 Oudh 415, Foll. (*Gokaran Nath Misra, J.*) MOHAN *v.* PARMAI. **97 I.C. 569=3 O.W.N, 639 (Oudh.)**

—S. 40—Applicability.

A District Judge may transfer to any Subordinate Judge under his administrative control any appeals pending before him from the decrees or orders before him. But an order of a Munsif under S. 476 refusing to prosecute a person under S. 193, Penal Code, is not an order of a Munsif within the meaning of S. 40, and the District Judge to whom the appeal from that order is preferred has no jurisdiction to transfer it, to be decided by a Subordinate Judge. (*Stuart, C.J., and Raza, J.*) BISMILLAH KHAN *v.* SHAKIR ALI. **114 I.C. 812=5 O.W.N. 882=4 Luck. 155=30 Cr. L.J. 382=A.I.R. 1928 Oudh 494.**

OUDH COURTS ACT, (1925)—S. 48—Applicability.

—S. 48—Applicability.

———*No term fixed.*

Where there was no term fixed for redemption in the mortgage of 1849 and if there was any such term fixed it had not expired before the 13th day of February 1856:

Held: that the provisions of S. 48, Oudh Courts Act, 1925, were inapplicable and that the provisions of Art. 148, Limitation Act, 1908, were applicable. *(Wazir Hasan and Gokaran Nath Misra, JJ.)* SURAJ BAKHSH *v.* GANGA BAKHSH. **105 I.C. 93 = 4 O.W.N. 882 = A. I. R. 1927 Oudh 457.**

OUDH ESTATES ACT, (I of 1869, as amended by III of 1910.)

—Confiscation—First Settlement.

The defendants did not claim any under-proprietary rights at the first settlement and though the tasfia lagan described the defendant's ancestors as holding under a gift yet they had all along been recorded as ordinary tenants.

Held: that any rights possessed by the defendants before the annexation of Oudh cannot be considered to have been wiped out as a result of the general confiscation; and that though no decree for under-proprietary rights was obtained at the first regular settlement, the defendants can claim such rights in a subsequent suit: A.I.R. 1927 Oudh 74, Foll. *(Srivastava, J.)* JAS KARAN SINGH *v.* RAM TAHAL. **114 I. C. 307 (Oudh).**

———*Under-proprietary rights.*

The effect of confiscation and subsequent restoration of immoveable properties in the province of Oudh is not the same in the case of taluqdari and non-taluqdari properties. Under-proprietary tenures were relieved from the effect of the confiscation by the letter of the 10th October 1859 subsequenty appended to the Oudh Estates Act, 1869. *(Wazir Hasan, A.J.C.)* JAGMOHAN SINGH *v.* RAM DAYAL. **61 I.C. 135 = 8 O.L.J. 4 = A.I.R. 1921 Oudh 42.**

—Najib-ul-tarfain—Meaning of.

The expression *najib-ul-tarfain* in the connection in which it is used in the Oudh Estates Act means nothing more than that the person to whom it is applied is a person of good family on both sides. It does not mean that he must be the offspring of parents who belong to the same *biradri*. *(Lindsay, J.C., and Daniels, A. J. C,)* AHMAD KHAN *v.* HURMUSJI KHANUM. **61 I.C. 177 = 8 O.L. J. 27 = A. I. R. 1921 Oudh 81.**

—Personal Law.

The Oudh Estates Act (I of 1869) and the Amending Act (III of 1910) are not designed to force the arbitrary and unnatural line of succession on all taluqdars regardless of their family law, but are meant to be adopted to the circumstances of different classes of taluqdars, except where an express deviation is made from the rules ordinarily applicable. *(Viscount Sumner.)* RAGHURAJ CHANDRA *v.* RANI SUBHADRA KUNWAR. **108 I.C. 673 = 3 Luck. 76 = 55 I.A. 132 = 26 A.L.J. 609 = 30 Bom. L.R. 822 = 32 C.W.N. 1001 = 5 O.W.N. 443 = A.I.R. 1928 P.C. 87 = 55 M.L.J. 778.**

———*Estate.*

If nothing were known as to how or when a certain property left by a deceased Talukdar came into his possession, it might fairly be held that in the absence of any evidence, his personal law should be applied to questions of succession thereto and this would be still more strongly the case if it were shown that the property had been acquired subsequent to the time of the British annexation. But when definite evidence regarding the history of the property is available, the *onus* of proof may be shifted to the party claiming that the property formed part of the "estate" of the deceased as defined in the Oudh Estates Act. *(Lindsay, J. C. and Daniels, A. J. C.)* MT. IMTIAZI BEGAM *v.* MT. HURMUZI KHANAM. **61 I.C. 196 = 8 O.L.J. 67 = A.I.R. 1921 Oudh 59.**

OUDH ESTATES ACT, (1869)—Scope of.

—Primogeniture.

Under the Oudh Estates Act the succession to collaterals opens on the death of the widow just as under the ordinary Hindu law, and the reversioner during the lifetime of the widow has no more than an expectancy, and so has no interest in the property which he is competent to transfer or bind.

In a suit by a reversioner for a declaration that the alleged will of the deceased giving his widow power to adopt, was void, the Court can only make a declaration binding on the widows. But it is not within its competence to make a valid declaration that would create in the reversioner's favour an interest in the property that did not otherwise exist. *(Sir Lawrence Jenkins.)* THAKURAIN HARNATH KUAR *v.* THAKUR INDAR BAHADUR SINGH. **71 I.C. 629 = 50 I.A. 69 = 37 C.L.J. 346 = 45 All. 179 = 27 C. W.N 949 = 26 O.C. 223 = 18 M.L.W. 383 = 33 M.L.T. 216 = 5 Pat. L.T. 281 = 9 O.L.J. 652 = 2 Pat. L.R. Civ. 237 = A. I. R. 1922 P.C. 403 = 44 M.L.J. 489.**

—Retrospective.

Under Section 14 a devise in favour of a younger son in case of list II if validly made took the estate outside the operation of the Act. The new Sect. 14 was made retrospective except that it was not to operate to deprive any person of a title which had lawfully vested in him before the commencement of the Act. The result was that where a valid bequest of taluqdari property has been made to a younger son before the commencement of the Amending Act, such property in the hands of the legatee again became taluqdari property. The section however does not operate to convert an invalid bequest into a valid bequest. *(Daniels and Lyle, A. J. Cs.)* NAGESHAR SAHAI *v.* MATA PRASAD. **69 I.C. 730 = 9 O.L.J. 235 = 25 O.C. 189 = A.I.R. 1922 Oudh 236.**

—Scope of.

Although under S. 14 a transfer made to remote heir would remove the estate from the operation of the Act, the Amending Act of 1910 definitely brought back within the operation of the Act, all estates which had been so transferred. 36 All. 373, (P. C.) Ref. *(Pullan, J.)* MOHAMED ALI KHAN *v.* NISAR ALI KHAN. **109 I.C. 835 = 1 L.C. 592 = A.I.R. 1928 Oudh 67.**

——— Every talukdar is competent to dispose of his property under certain conditions, either by deed or by will, and if any such deed or bequest breaks the line of succession provided by the Act the taluqa ceases to be regulated by the special provisions of the Act and becomes subject to the ordinary laws of inheritance. If, however, the transfer or bequest is to the next heir in succession according to the Act, such transfer or bequest does not break the limitations. Under the Amending Act, Act III of 1910 it is not necessary in order to save the limitations that the transfer of bequest should be to the immediate next heir but where the succession in dispute had opened before the passing of the Act it will have no bearing on the case except in certain respects with regard to which it was made retrospective; the rule of male lineal primogeniture applies after the special successions provided by clauses 1 to 10 are exhausted. and

OUDH ESTATES ACT, (1869)—Transfers before amendment.

where Cl. 11 is invoked. (*Lord Phillimore, J.*) SITHA BAKSH SINGH *v.* SITAL SINGH. **60 I.C. 548 = 43 All. 245 = 48 I.A. 228 = 24 O.C. 107 = 19 A.L.J. 337 = 33 C.L.J. 520 = 25 C.W.N. 721 = 8 O.L.J. 214 = A.I.R. 1921 P.C. 14 = 40 M.L.J. 449.**

—Transfers before amendment.

A transfer before the Amending Act of 1910 to a person who was not the immediate successor, even though that person be in the line of succession, operates to take the estate out of the special limitations of descent. (*Lord Phillimore.*) LAL RAM *v.* DY. COMMR., PARTABGAR. **76 I.C. 922 = 29 C.W.N. 86 = 1923 M.W.N. 591 = 45 All. 596 = 50 I.A. 265 = 26 O.C. 257 = 21 A.L.J. 777 = 33 M.L.T. 355 = 10 O.L.J. 513 = A.I.R. 1923 P.C. 160 = 47 M.L.J. 260.**

—S. 1—Estate.

Where a taluqa is held by a person as taluqdar, his name is entered in lists 1 and 2 and a taluqdari sanad is granted to him, the taluqa is an "estate" within Ss. 1 and 3 of the Act. (*Stuart, C. J., and Raza, J.*) MIRZA MD. SADIQ ALI KHAN *v.* FAKHR JAHAN BEGAM. **117 I.C. 385 = 3 Luck. 521 = 6 O.W.N. 1251 = A.I.R. 1929 Oudh 97.**

—S. 3—Effect of proclamation.

——*Proprietary and under-proprietary rights.*

The effect of the proclamation by Lord Canning by which proprietary rights in the soil of Oudh were confiscated, was that both proprietary and under-proprietary rights passed to British Government; and when the full proprietary right, title and possession of the estate of Tiloi was re-granted it was a condition of the grant that all holding under the grantee should be secured by him in the possession of all the subordinate rights which they formerly enjoyed: A.I.R. 1927 Oudh 74, Affirmed. (*Sir Lancelot Sanderson.*) RAJA BAHADUR RAJA BISHNATH SARAN SINGH *v.* RAWAT SINGH. **34 C.W.N. 765 = A.I.R. 1930 P.C. 179. (P.C.)**

——The effect of Lord Canning's Proclamation is that the whole of the rights in the soil of Oudh, with the exception of the estates specially exempted, passed from the former owners and became the property of the Crown. The confiscation did not vest the rights in any one. It vested the rights in the Crown. The Crown becoming the absolute owner, all subordinate rights ceased to exist. But when the Crown restored full proprietary rights, the restoration of full proprietary rights involved automatically the restoration of the rights of subordinate proprietors which had originally been held by them against the former proprietor: A.I.R. 1927 Oudh 74, Foll. (*Stuart, C. J. and Raza, J.*) DY. COMMR. *v.* MT. MUNNI. **110 I.C. 56 = 5 O.W.N. 202 = 3 Luck. 446 = A.I.R. 1929 Oudh 80.**

——The effect of Lord Canning's Proclamation is that the whole of the rights in the soil of Oudh, with the exception of the estates specially exempted, passed from the former owners and became the property of the Crown. The confiscation could not and did not mean that the rights in the soil became vested in the Crown, and the Crown becoming absolute owner, all subordinate rights likewise ceased to exist, and the restoration by the Crown of full proprietary rights in an estate confiscated by Lord Canning's Proclamation involved automatically the restoration of the rights of subordinate proprietors which had been originally held by them against the former proprietor: 14 M.I.A. 112; 11 Cal. 318; 12 Cal. 1 (P. C.); and 23 Cal. 483; Rel. on. (*Stuart, C. J., and Wazir Hasan, J.*)

OUDH ESTATES ACT, (1869)—S. 8—No transfer of estate.

SHEO BAHADUR SINGH *v.* BISHNATH. **99 I.C. 876 = 2 Luck. 4 = 4 O.W.N. 15 = 8 L.R.A. Rev. 48 = A. I. R. 1927 Oudh 74. (Affirmed on appeal A.I.R. 1930 P.C. 179.)**

—S. 3—Estate.

Where a *wajib-ul-arz* stated that since the date of the grant, that is 1858-1859, the village had continued to remain in the possession and occupation of the Raja, and, according to the terms of the grant, it was to be held revenue free for 20 years, and from November 1879 the Government revenue was chargeable,

Held: the inference was that at the time of the first regular settlement the village was held in proprietary right and the presumption was that it must have been decreed to him at that settlement and the village must be held to be an "estate" by virtue of the second part of S. 3: A.I.R. 1923 P.C. 70; A.I.R. 1927 P.C. 113; and 27 All. 634; Ref. (*Stuart, C. J. and Wazir Hasan, J.*). LAL HARIHAR PRATAP BAKHSH SINGH *v.* BISHESHWAR BAKHSH SINGH. **109 I.C. 422 = 5 O.W.N. 299 = 3 Luck. 326 = A.I.R. 1928 Oudh 307,**

—S. 3—Taluqdar.

——*Conclusive evidence.*

If a person's name is entered in list 1 of the list prescribed by S. 8, Oudh Estates Act, and a certain estate is entered against his name in the column "name of estate," then according to S. 10, Oudh Estates Act, the entry is conclusive evidence not only of the fact that the taluqdar was a taluqdar within the meaning of the Act, but also of the fact that he was a taluqdar possessed of the estate. This is the significance which must be attached to the word "such" which precedes "taluqdar" in the last line of S. 10, and it follows that the estate possessed by him was held by him in the manner mentioned in S. 3 of the Act: 5 I.A. 1, Foll. (*Stuart, C. J. and Wazir Hasan, J.*) HARIHAR PRATAP BAKSH SINGH *v.* BISHESHWAR BAKHSH SINGH. **109 I.C. 422 = 3 Luck. 326 = 5 O.W.N. 299 = A.I.R. 1928 Oudh 307,**

—S. 4—Applicability.

The phrase "the said orders" in S. 6 does not include decrees dismissing a previous redemption suit. 28 All. 1 (P.C.) Dist. (*Daniels, A. J. C.*). BRIJ KISHORE *v.* BAJRUNG BAHADUR. **64 I.C. 271 = 24 O.C. 285 = A.I.R. 1921 Oudh 139.**

—S. 5—Applicability of limitations.

Estate granted in lieu of one in List 5 is governed by the rules in List 5 in absence of express terms in grant. Such grant and inclusion in List 5 is not *ultra vires* and the limitations constituting the rule of succession are valid under the Crown Grants Act. (*Stuart, C. J. and Hasan, J.*). JUGDEO SINGH *v.* DEPUTY COMMISSIONER, PARTABGARH. **2 Luck. 507 = 96 I.C. 47 = 29 O.C. 176 = 3 O.W.N. Sup. 56 = 13 O.L.J. 762 = A.I.R. 1926 Oudh 431.**

—S. 8—Mistakes in entries.

Entries in the names of deceased persons in the lists mentioned in S. 8 do not appear to have been contemplated by the Act but such entries have no doubt been made and they are practically harmless if the names were already in former lists made under the orders in Council or if the entries do not alter the previously acquired rights of any one: 26 All. 119, (P.C.) Foll. (*Stuart, C. J. and Wazir Hasan, J.*) SATGUR PRASAD *v.* HAR-NARAIN DAS. **111 I.C. 817 = A.I.R. 1929 Oudh 44.**

—S. 8— No transfer of estate.

——*Compromise.*

OUDH ESTATES ACT, (1869)—S. 8—Presumption.

A taluqdar, whose name was entered in lists 1 and 2 prepared according to the provisions of S. 1, Oudh Estates Act, died leaving surviving him his widow and half-brother. Accordingly the title to the estate devolved on the half-brother by virtue of Cl. (6), S. 22, Act 1, 1869. The name of the widow, however, was entered in respect of the estate in the revenue registers. This compelled the brother to institute a suit for the purpose of establishing his title to the estate against this widow The dispute was amicably settled by a compromise; the brother was declared to be the absolute owner of the entire estate and the widow was allowed to remain in possession of the villages by way of guzara,

Held: that, under the compromise, the brother did not acquire the estate as a transferee from the widow. The true construction of the compromise was that thereby the widow recognized the pre-existing right of the brother in the inheritance, and any claim which the widow might have had to the estate on the basis of her husband's will was abandoned and that the provisions of the Oudh Estates Act still applied to the devolution of the estate. (*Stuart, C. J. and Wazir Hasan, J.*) HARIHAR PRATAP BAKHSH SINGH *v.* BISHESHAR BAKHSH SINGH. **109 I.C. 422=3 Luck. 326=5 O.W.N. 299=A.I.R. 1928 Oudh 307.**

—S. 8—Presumption.

The presumption applicable to an estate entered in List II would also apply to an estate not so entered, but in regard to the latter the presumption would not be conclusive. The presumption cannot be wholly done away with on the estate being removed from the provisions of the Act so long as it remains in the family, though it may not be conclusive under Section 10. 1 O.L.J. 758 Dist. (*Kanhaiya Lal and Dalal, A. J. Cs.*) ZARIF-UNNISA *v.* SHAFIQ-UZ-ZAMAN. **75 I.C. 626=26 O.C. 133=10 O.L.J. 535=A.I.R. 1923 Oudh 185.**

—S. 8—Transfer of estate.

The limitations prescribed by the lists prepared under S. 8 are as much rules of succession, so far as they go, as the provisions of Ss. 22 and 23 of Act 1 of 1869; 10 Cal. 511 (P.C.); 20 Cal. 649 (P.C.) and 32 All. 599 Rel. on.

When the line of succession as prescribed by the Act is broken by a transfer or bequest of the nature mentioned in S. 15, the limitations prescribed by the Act either in the lists or in the provisions of S. 22 disappear and the property thenceforward is subject to the ordinary law of succession, and although the ordinary law may embrace a rule of custom; in such a case the custom must be proved independently of the limitations prescribed by the Act: A. I. R. 1921. P.C. 4 Foll. (*Hasan and Misra, JJ.*) ACHCHE MIRZA *v.* AHMAD SHAH. **97 I.C. 922=1 Luck. 529=3 O.W.N. 693=A.I.R. 1926 Oudh 594.**

———Every talukdar is competent to dispose of his property under certain conditions, either by deed or by will, and if any such deed or bequest breaks the line of succession provided by the Act the taluqa ceases to be regulated by the special provisions of the Act and becomes subject to the ordinary laws of inheritance. If, however, the transfer or bequest is to the next heir in succession according to the Act, such transfer or bequest does not break the limitations. Under the Amending Act, Act III of 1910, it is not necessary in order to save the limitations that the transfer or bequest should be to the immediate next heir; but where the succession in dispute had opened before the passing of the Act it will have no bearing on the case except in certain respects with regard to which it was made retrospective: the rule of male lineal primogeniture applies after the special successions provided by clauses 1 to 10 are exhausted, and where Cl. 11 is invoked. (*Lord Phillimore.*) SITLA BAKSH SINGH *v.* SITAL SINGH. **60 I.C. 548=43 All. 245=48 I.A. 228=24 O.C. 107=19 A.L.J. 337=33 C.L.J. 520=25 C.W.N. 721=8 O.L.J. 214=A.I.R. 1921 P.C. 14=40 M.L.J. 449.**

OUDH ESTATES ACT, (1869)—S. 11—Powers of widow.

S. 10—Effect of entry.

———*Conclusive evidence.*

S. 10 provides that the Court shall take judicial notice of the lists and shall regard them as conclusive evidence of the facts they record: 38 All. 552 (P.C.), Rel. on.

Where therefore a person's name was entered in list 3.

Held: that in the absence of any evidence to show that his name was wrongly inserted in List 3, his inclusion in that list is conclusive that the sanad he obtained was a primogeniture grant. In other words, that he was a taluqdar taking an estate under a primogeniture sanad under the provisions of the Act, and that the succession to the estate was as provided in S. 22 of the Act. (*Mr. Ameer Ali.*) MT. NAND RANI *v.* MT. INDAR KUNWAR. **100 I.C. 485=1 Luck. 583=54 I.A. 5=1927 M.W.N. 21=4 O.W.N. 80=31 C.W.N. 485=45 C.L.J. 282=25 M.L.W. 751=A.I.R. 1927 P.C. 8=52 M.L.J. 497.**

—S. 11—Alienation by widow.

———*Liability for debts.*

The intention of S. 11 read with the terms of Cl. 7, S. 22 and the definition of "heir" given in the Act, seems clearly to be that the widow should not be competent to make any transfer of the whole or any portion of the estate beyond her lifetime. The words "for her lifetime only" seem clearly intended to provide that while she is to be allowed full enjoyment during her lifetime yet she must leave the estate unimpaired for the reversioner. Any pecuniary liability incurred by her cannot be enforced against the estate in the hands of the reversioners after her death: A. I. R. 1922 P.C. 403; 18 O. C. 289; 1 O. D. 264; A.I.R. 1927 Oudh 278, Ref.; 18 Cal. 111; 25 All.; 478; A.I.R. 1922 P.C. 403; A.I.R. 1928 P. C. 87, Dist. (*Pullan and Srivastava, JJ.*) BISHESHWAR BUKSH SINGH *v.* JANG BAHADUR SINGH. **122 I.C. 614=7 O.W.N. 173=A.I.R. 1930 Oudh 225.**

—S. 11—Debts by widow.

Where the widow of a talukdar enters into a transaction for the construction of a temple not personally on her own behalf but for the spiritual benefit of her husband she must be deemed to have entered into the contract as representing the estate and if amount of expense incurred by her on account of construction is not excessive having regard to property inherited by her, creditor claiming costs of construction is entitled to enforce his claim against the non-taluqdari property left by the widow after her death. (*Pullan and Srivastava, JJ.*) BISHESHWAR BUKSH SINGH *v.* JANG BAHADUR SINGH. **122 I.C. 614=7 O.W.N. 173=A.I.R. 1930 Oudh 225.**

—S. 11—Powers of widow.

Section 11 is not a complete code laying down the powers of transfer to be enjoyed by every class of person referred to in the Act. S. 11, does not apply to talukdar's widow and as they are not expressly debarred from exercising powers of transfer, they may exercise such powers of transfer as are ordinarily exercisable by tenant for life. (*King, J.*) KRISHNA-

OUDH ESTATES ACT, (1869)—S. 11—Validity of will.

PAL SINGH *v.* SRI RAJ KUAR. 104 I.C. 293 = 1 L.C. 97 = A.I.R. 1927 Oudh 278.

—S. 11—Validity of will.

Will executed by taluqdar conferring upon his nephew some powers as testator—Subsequently it provided three consecutive life estates—Creation of fourth on termination of first three—Authority for appointment of nominee to last holder of three life estates or choice of election to descendants of three life-holders—Failing that Government empowered to appoint successor—Will was held invalid as not conferring absloute interest and creating interest in persons unborn. (*Stuart, C. J. and Raza, J.*) NISAR ALI KHAN *v.* MUHAMMAD ALI KHAN. 119 I.C. 337 = 6 O.W.N. 543 = A.I.R. 1929 Oudh 494.

—S. 12—Entailed estate.

Creation of an entailed or inalienable estate is not permitted under the Indian Law and would fail even if the will had been valid by complying with all the conditions laid down in Section 13 of Act I of 1869.

A successive life estate may be given to certain persons, within the limits prescribed by Section 12 of Act I of 1869, but the ultimate reversion must in that case be absolutely granted to a person or persons in existence on the expiry of the last life estate and no restraint on alienation inconsistent with the grant of a full estate to the ultimate beneficiary or legatee can be recognised. (*Kanhaiya Lal and Dalal, A. J. Cs.*) CHAUDHRAIN ZARIF-UN-NISA *v.* CHAUDHRI SHAFIQ-UZ-ZAMAN. 75 I.C. 626 = 26 O.C. 133 = 10 O.L.J. 535 = A.I.R. 1923 Oudh 185.

—S. 13—Applicability.

Section 13, Cl. (2), refers to a younger son of a Talukdar whose name is entered in List 5 and who does make a transfer of the property covered by that list. It is difficult to hold that if a Talukdar's name is entered in two lists, that is List No. 2 and List 3 or List 5, and he makes a transfer of his property in List 2 to his younger son, the transfer should be considered to be good without the formalities required under S. 13, or that all the property transferred is to continue to remain Talukdari property. The intention of the Legislature in making exemption in favour of a younger son of a Talukdar whose name was entered in List 5 or List 3 was to make that exemption operative only when the property transferred was of the said list. A.I.R. 1925, P.C. 272, Rel. on. (*Stuart, C. J. and Misra, J.*) AHMAD AZIM *v.* SAFI JAN. 97 I.C. 897 = 2 Luck. 335 = 3 O.W.N. Sup. 102 = A.I.R. 1926 Oudh 561.

—S. 13—Interpretation.

S. 13 provides an exception in favour of a person who would have succeeded to the estate, if the *taluqdar* or grantee had died intestate under the special provisions relating to succession embodied in the Act, if the estate was one to which those special provisions relating to succession were applicable or under the ordinary law of the tribe and religion of the *taluqdar* or grantee, if the special provisions relating to succession, so laid down, were not applicable. The person in whose favour the exception has been made would in any case be the person who would have been the immediate heir or the heir-at-law of the *taluqdar* or grantee, had the latter died intestate, according to the law applicable to his estate. It is difficult to conceive that it was intended to extend the exception as much to persons, who would have been entitled to inherit under the ordinary law in case of intestacy as if Act I of 1869 had not been passed. (*Kanhaiya Lal and Dalal, A. J. Cs.*) ZARIF-UNNISA *v.* SHAFIQ-UZ-

OUDH ESTATES ACT. (1869)—S. 14—Younger son.

ZAMAN. 75 I.C 626 = 26 O.C. 133 = 10 O.L.J. 535 = A.I.R. 1923 Oudh 185.

—S. 13-A.—Applicability.

Per Daniels, J. C. and Simpson, A. J. C. (Dalal, A. J. C., dissenting).—A will made by a taluqdar of an estate entered in list II of the lists prepared under S. 8 of the Oudh Estates Act, in favour of an *agnate* of the testator, who is not the nearest *agnate* at the time of the testator's death, is governed by Sub-S. (2) of S. 13-A of Act I as amended by the Oudh Estates Amendment Act of 1910. (*Simpson, A. J. C. on difference between Daniels, J. C, and Dalal, A. J. C.*) ACHAL SINGH *v.* SHAGHUNATH KUER. 90 I.C. 470 = 29 O.C. 51 = 2 O.W.N. 713 = 12 O.L.J. 605 = A.I.R. 1926 Oudh 2.

—S. 14—Remote heir.

———*Amending Act.*

Although under S. 14 a transfer made to remote heir would remove the estate from the operation of the Act, the Amending Act of 1910 definitely brought back within the operation of the Act all estates which had been so transferred : 36 All. 373, (P.C.), Ref. (*Pullan, J.*) MAHOMED ALI KHAN *v.* NISAR ALI KHAN. 109 I.C. 835 = 1 L.C. 592 = A.I.R. 1928 Oudh 67.

—S. 14—Right to bequest.

Decree against taluqdars obtained by testator's predecessor and certain others, granting under-proprietary rights—On appeal by taluqdar decree reversed—Persons other than testator's predecessor preferring second appeal, decision of Court of first instance affirmed—Subsequently all persons including predecessors of testators recognized and recorded as under-proprietors—Fact not disputed in litigation between testator's predecessors and taluqdars—Though predecessors of testator were not parties to appeal the evidence was held sufficient to show their title as under-proprietor and bequest made by them was held valid. A. I. R. 1925 Oudh 732; A. I. R. 1922 P. C. 383, Foll. (*Misra and Raza, JJ.*) FAQIR BAKSH SINGH *v.* UDERAJ SINGH. 119 I.C. 456 = 6 O.W.N. 624 = A.I.R. 1930 Oudh 29.

—S. 14—Scope of.

Per W. Hasan, A. J. C.—S. 15 as well as S. 14 deal with cases of transfer made before and also after the passing of the Act. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) MT. INDAR KUAR *v.* MT. NAND RANI KUAR. 80 I.C. 333 = 10 O.L.J. 657 = A.I.R. 1924 Oudh 273.

—S. 14—Succession after bequest.

Where the judgment-debtor is one of the persons mentioned in Cl. (2), S. 13 (A), he holds the village bequeathed to him by his grandfather subject to the same conditions and to the same rules of succession as the testator, under S. 14 : A. I. R. 1925 Oudh 709, Rel. on. 16 O. C. 277, Dist. (*Wazir Hasan and Srivastava, JJ.*) MUHAMMAD USMAN KHAN *v.* BANKEY LAL. 6 O.W.N. 759 = A.I.R. 1929 Oudh 467.

—S. 14—Younger son.

Under Section 14 a devise in favour of a younger son in case of list II if validly made took the estate outside the operation of the Act. The new Sect. 14 was made retrospective except that it was not to operate to deprive any person of a title which had lawfully vested in him before the commencement of the Act. The result was that where a valid bequest of *taluqdari* property had been made to a younger son before the commencement of the Amending Act, such property in the hands of the legatee again became *taluqdari* property. The section however does not operate to convert an invalid bequest into a

OUDH ESTATES ACT (1869), S. 15—Applicability.

valid bequest. *(Daniels and Lyle. A. J. Cs.)* NAGESHAR SAHAI v. MATA PRASAD. **69 I.C. 730=9 O.L.J. 255=25 O.C. 189=A.I.R. 1922 Oudh 286.**

—S. 15—Applicability.

S. 15 is wrongly applied to property which is not under transfer at the time of the passing of Act I of 1869. Whatever transfers may have been made between the 1858 and 1869, that is, after the Summary Settlement and before the passing of the Act, if at the time of the Act the property is in the possession of the Talukdar unburdened by any trusts or vested interest, the provisions of S. 15 will not apply. S. 15 was enacted to take out of the Act estates which at the time of the passing of the Act were held by persons other than Talukdars with whom Summary Settlement was made. *(Dalal, J. C. and Wazir Hasain, A. J. C.)* MT. INDAR KUAR *v.* MT. NAND RANI KUAR. **80 I.C. 333=10 O.L.J. 657=A. I. R. 1924 Oudh 273.**

—S. 15—Arbitration.

———*Award is transfer.*

Where the several claimants to the estate of a deceased taluqdar referred their dispute as to succession by interpreting a will left by the taluqdar to arbitration and under the award so made, one of them got a portion of the property which he would not have got according to the provisions of the Act.

Held: that the award must be treated as a transfer under S. 15 to a person not qualified by S. 13 and so the property got by him must be held as got outside the Act and its succession would in future be regulated by the rules which would govern the succession to property bought from an outsider, but the taking of an estate out of the statutory entail does not *per se* render inoperative a statement made in the Act that the particular estate descended by custom in a particular manner: A. I. R. 1923 Oudh 185, Affirmed. *(Lord Phillimore.)* DEPUTY COMMISSIONER OF BARABANKI *v* SHAFIQ-UZ-ZAMAN. **113 I.C. 113=3 Luck 372=55 I.A. 303=29 M.L.W. 793=5 O.W.N. 565=32 C.W.N. 1120=48 C.L.J. 418=A. I. R. 1928 P.C. 202=56 M.L.J. 601 (P.C.)**

—S. 15—Custom.

Where by the operation of S. 15 of the Act, a Talukdari Estate governed by the Act and recorded in list II of the Act as an estate devolving on a single heir is taken out of the provisions of the Act, the incident of single heir succession attached to the estate is not put an end to provided the estate was subject to the custom of a single heir succession prior to the application of the Act thereto.

If an estate is removed from the operation of the Act, the succession to the estate is governed by the personal law of the parties as varied by the family custom, if any.

In respect of an estate which has been removed from the operation of the Act, a family custom can be set up. *(Kendall and Pullan, A. J. Cs.)* (RANI) ABADI BEGAM *v.* MIRSA AHMED MIRSA BEGAM. **82 I.C. 691=11 O.L.J. 757=A.I.R. 1925 Oudh 190.**

—S. 15—'Estate'—Bequest.

An estate to which title is acquired by the will of the last holder ceases to be an estate within the meaning of the Oudh Estates Act, (I of 1869). 16 O. C. 277, Foll. *(Wazir Hasan and Simpson, A. J. Cs.)* AMEER MIRZA BEG *v.* UDIT PERSHAD. **90 I.C. 779=2 O.W.N. 816=A.I.R. 1925 Oudh 709.**

—S. 16—Maintenance.

———*Grant of Estate in lieu of—Legatee of*

OUDH ESTATES ACT (1869), S. 19—Validity of will.

Taluq selecting and allotting lands to certain persons in lieu of maintenance in accordance with will—No registered instrument is necessary.

A Taluqdar of Oudh whose name was entered in the fourth list prepared under S. 8 of the Oudh Estates Act left a will whereby he devised the Taluq to his great-grandson and provided therein that when the grandson of the testator and uncles of the legatee separate themselves from him, they shall receive maintenance allowance in the form of grants of land so that after paying various dues they shall get certain amounts annually. The legatee selected the villages to be appropriated under the will and allotted them to the uncles and placed them in possession. *Held*, that the uncles' right to maintenance out of the estate was conferred by the will which was duly registered and which imposed on the Taluqdar the duty of selecting the particular villages out of which the maintenance should be received. In making this selection the Taluqdar imposed no additional burden on the estate, but limited and defined in accordance with the will, the burden imposed by that instrument. The selection, once made and accepted, could not be disturbed either by the Taluqdar or by the *guzara* holders; and if it had been necessary to confirm it, by a registered and attested instrument, it would have been the duty of the Taluqdar to furnish such confirmation. But no such instrument was required, and the provisions of the will followed by the appropriation of villages and delivery of possession vested in the *guzara* holders a good and sufficient title. Also the legatee had no equitable claim to relief. *(Viscount Cave.)* LAL JAGADISH BAHADUR SINGH *v.* MAHABIR PRASAD SINGH. **58 I.C. 845=42 All. 422=47 I.A. 116=23 O.C. 54=24 C.W.N. 529=1920 M.W.N. 342=7 O.L.J. 196=13 M.L.W. 19=A.I.R. 1921 P.C. 43 (P.C.)**

—S. 16—Validity of Gift.

Obiter—Conditions laid down by Act I of 1869 are the only conditions of a valid gift of "estate" property by a taluqdar and no other conditions are necessary for the validity of such a gift as special laws override general laws. Therefore, the validity of the gift by a taluqdar of "estate" property should be determined with reference to the special provisions in Act I of 1869 and without reference to the general provisions of Hindu Law or of the Transfer of Property Act. *(King, J.)* KRISHNA PAL SINGH *v.* SRI RAJ KAUR. **104 I. C. 299=1 L. C. 97=A. I. R. 1927 Oudh 278.**

—S. 17—Vaidity of gift.

Obiter.—Under S. 17 both delivery of possession and registration are essential to validate a gift: 2 O.C. 244 Diss. from. *(King, J.)* KRISHNA PAL SINGH *v.* SRI RAJ KAUR. **104 I.C. 299=1 L.C. 97=A.I.R. 1927 Oudh. 278.**

—S. 19—Applicability.

S. 19 of the Oudh Estates Act would not apply to a bequest by a taluqdar of non-taluqdari property. The formality of attestation is not necessary in such a case. *(Dalal. J.C. and Neave, A.J C.)* MOHAMMAD HASAN *v.* ALI HAIDER. **85 I.C. 509=12 O.L.J. 1=28 O.C. 8=A.I.R. 1925 Oudh 337.**

—S. 19—Validity of will.

A legatee signing the will as an attesting witness does not forfeit all the benefits under the will under S. 54, Act X of 1865 read with S. 19, Act I of 1869: A.I R. 1927 P.C. 248, Foll. *(Stuart, C.J. and Raza, J.)* NISAR ALI KHAN *v.* MUHAMMAD ALI KHAN. **119 I.C. 337=6 O.W.N. 549=A.I.R. 1929 Oudh 494.**

OUDH ESTATES ACT (1869), S. 19—Will before Act.

—S. 19—Will before Act.

The formalities required of the will of a taluqdar are stated in S. 10, Oudh Estates Act, 1869. The exception and the only exception provided for is "that nothing herein contained shall affect wills made before the passing of this Act." The enactment is imperative and must be given effect to. These formalities relate to the execution of the will of a taluqdar and have no relation whatsoever to the time when the will comes into effect: A.I.R. 1916 P.C. 89 and A.I.R. 1925, P.C. 272 Foll. (*Stuart C.J. and Wazir Hasan, J.*) HARIHAK PROTOP BAKHSH SINGH *v.* BISHESHAR BAKHSH SINGH. **109 I.C. 422=3 Luck. 326=5 O.W.N. 299=A.I.R. 1928 Oudh 307.**

—S. 22—Adopted son and collaterals.

According to the order of succession created by Section 22 of the Act, the widow ranks much higher in the line of heirs than a collateral. She succeeds under Clause (7) and the collateral only under Clause (11). No interest can vest in a collateral during her lifetime, and she is the only person who can represent the estate. The act takes account of Hindu Law in the case of Hindus, when Clause 11 of the Section 22 is reached; the heir is to be determined according to the ordinary law to which persons of the religion and tribe of the taluqdar or grantee, heir or legatee, are subject. Where the law to which the testator was subject was Hindu Law as applicable to impartible estates which descends by the rule of lineal primogeniture *held*; under this law, an adopted son, whether adopted by the taluqdar himself or under his authority by his widow after his death, takes in preference to any collateral. (*Daniels and Lyle, A.J.C.*) NAGESHAR SAHAI *v.* MATA PRASAD. **69 I.C. 730=9 O.L.J. 235=25 O.C. 189=A.I.R. 1922 Oudh. 236.**

—S. 22—Applicability.

To attract the application of Cl. 10, S. 22, Act I, 1869, as amended by Act III of 1910, the plaintiff has to establish: (1) that the succession to the property was governed by the provisions of S. 22, Act 1, 1869; (2) that the property in dispute is an estate within the meaning of the Act; and (3) that the plaintiff is the nearest male agnate according to the rule of lineal primogeniture as required by Cl. 10, S. 22 of the Act. (*Stuart, C.J. and Wazir Hasan, J.*) HARIHAR PRATAP BAKHSH SINGH *v.* BISHESHWAR BAKASH SINGH. **109 I.C. 422=3 Luck. 326=5 O.W.N. 299=A.I.R. 1928 Oudh 307.**

—S. 22—Daughter-in-law.

Daughter-in-law of the Talukdar must be deemed to be a stranger within the meaning of S. 18 of Act 2 of 1900. (*Gokaran Nath Misra, J.*) KRISHNA KUMARI DEVI *v.* RAJENDRA BAHADUR SINHA. **104 I.C. 155=6 O.W.N. 1150=13 O.L.J. 846=2 Luck. 43=A.I.R. 1927 Oudh 240.**

—S. 22—Deed of adoption.—Construction.

A Taluqdar adopted a son in 1866, *i, e.*, before Act I of 1869 came into force. In 1873 he executed in favour of the adopted boy a deed, in which he stated that his estate was not ancestral. The object in executing the deed was stated to be that the boy was adopted without any payment to his natural father, and that it was desirable to set forth the circumstances of the adoption in order that no claim might be raised in this respect. A desire was expressed that the Court of Wards should take the estate under its management until the adopted son's twentieth year.

Held that the deed was merely a declaration of an adoption made at a ceremony in 1866, and not an adoption deed of the kind referred to in Cl. (5) of S. 22 of unamended Act I of 1869 or a devise within the meaning of Ss. 11 and 13 of that Act, and it must be construed with reference to the provisions of Act I of 1869 as amended by the U. P. Act III of 1910,

It was impossible to regard this document as intended to invest the adoptee with the status of a son. Nor could the deed be construed as a devise from the passage in the documents expressing a desire that adoptee should be the owner and manager when he reaches his twentieth year. This passage amounted only to the expression of a desire that the Court of Wards should release the property when the adoptee would arrive at the age of twenty. A deed to be a testamentary devise must contain langage from which can be inferred an intention to make a devise; 3 I. A. 253 (P. C.), Dist. (*Ashworth, J.*) BRIJ RAJ CHANDRA *v.* SUBHADRA KUAR. **94 I. C. 294=13 O. L. J. 435=3 O. W. N. 321=A. I. R. 1926 Oudh 324.**

—S. 22—Equitable rights.

Although a holder of an equity giving him right to interests in the estate against the taluqdar could proceed against the taluqdar in possession in order to establish his rights, still the succession to the estate is to be governed by S. 22 of the Act if the taluqdar died intestate. (*Stuart, C. J. and Raza, J.*) MIRZA MD, SADIQ ALI KHAN *v.* FAKHR JAHAN BEGAM. **117 I. C. 385=3 Luck. 521=6 O. W. N. 1251=A. I. R. 1929 Oudh 97.**

—S. 22—Family Settlement.

Where by the agreement one brother agrees to forego his right under Section 22 as the brother to succeed to his brother's share, if he left a widow, it is subsequently not open to him, or to any one claiming through him to go behind that agreement in order to claim a right which has been surrendered. A family settlement is binding on the parties thereto because the object of such settlement is the reconciliation of existing differences and the avoidance of future dispute. (*Kanhaiya Lal, J. C. and Lyle, Off. A.J.C.*) MUHAMMAD YAQUB KHAN *v.* MUHAMMAD SAHIB ALI KHAN. **67 I. C. 556=9 O. L. J. 160=25 O. C. 21=A. I. R. 1922 Oudh 87.**

—S. 22—Females.

Not only a female but her whole line is excluded under the sanad. (*Dalal, J. C. and Neave, A.J.C.*). MOHAMMAD HASAN *v.* ALI HAIDER. **85 I.C. 509=12 O.L.J. 1=28 O.C. 8=A.I.R. 1925 Oudh 337.**

—S. 22—Interpretation.

———*Talukdar adopted—"Brother" does not include his natural brother.*

The word "brother" in Cl. (5) does not include a natural brother of the adopted talukdar. (*Viscount Summer,*) RAGHURAJ CHANDRA *v.* RANI SUBHADRA KUNWAR. **108 I.C. 673=3 Luck. 76=55 I.A. 139=26 A.L.J. 609=30 Bom. L.R. 829=32 C.W.N. 1009=5 O.W.N. 443=A.I.R. 1928 P.C. 87=55 M.L.J. 778 (P.C.)**

———"Brother" means brother according to personal law—Natural brother of adopted person is not brother. (*Stuart, C.J. and Hasan, J.*) BRIJ CHANDRA TEWARI *v.* SUBHADRA KUNWAR. **95 I.C. 798=1 Luck. 233=29 O.C. 218=3 O.W.N. Sup. 34=A.I.R. 1926 Oudh 449.**

———*'Son'—Muhamadans—Applicability to.*

"Son" in Cl. (1) of S. 22 includes a son adopted by ceremony where the personal law of the deceased Taluqdar allows such adoption. It is inconceivable that Act I of 1869 should have been intended to take away from Hindu Taluqdars their power to regulate succession to their estates by adoption by religious ceremony. When it is a question of the order of

OUDH ESTATES ACT (1869), S. 22—Interpretation.

succeesion, one looks to S. 22 of the Act, but that, when it is a question of determining relationship, one must go to personal law. It is impossible to work Act I of 1869 without invocation of the personal law : F. C. A, No. 118 of 1900, Foll.

Clause (5) and Cl. (8) of S. 22 should not be held to apply to any class but Muhammadans. Cl. (5) of S. 22 should only be held to confer a power of adoption by implication if such a power must necessarily be implied in order that the clause should have any meaning. S. 29 of the Act confers a power on Muhammadans to adopt by deed. It is expressed in the form of an enabling enactment and not in that of a restrictive one. Complete meaning can be given to Cl. (5) of S. 22 by reference to the power given in S. 29, and this power is only given to Muhammadans. The same remarks apply to Cl. (8) of S. 22, since S. 29 also confers a power of adoption by deed upon a Muhammadan widow of a Taluqdar , F.C.A. No.118 of 1900, Foll ; 3 Cal. 626 (P.C.), Dist. (*Ashworth, J.*) BRIJ RAJ CHANDRA *v.* SUBHADRA KUAR. **94 I.C. 294 = 13 O.L.J. 435 = 3 O.W.N. 321 = A.I.R. 1926 Oudh 324.**

———*Brother.*

"Brother" in Cl. (6) of S, 22 of Act 1 as amended by United Provinces Act III of 1910 does never refer to a natural brother, where there has been a valid adoption. Adoption, whether by ceremony or deed, must carry with it the consequence assigned to adoption by the personal law of the persons who are parties to the adoptton, that is to say, the civil death of the adopted boy in the natural family and re-birth in the adopted family. (*Ashworth. J.*) BRIJ RAJ CHANDRA *v.* SUBHADRA KUAR. **94 I.C. 294 = 13 O.L.J. 435 = 3 O.W.N. 321 = A.I.R. 1926 Oudh 324.**

—S. 22—Relationship.

The question of relationship between two persons whenever it arises for the purpose of determining the applicability or otherwise of any of the clauses of S. 22, must always be settled with reference to the personal law of the parties. Such questions may relate either to the existence or to the cessation of relationship or to both. (*Stuart, C.J. and Hasan, J.*) BRIJ CHANDRA TEWARI *v.* SUBHADNA KURWAR. **95 I.C. 798 = 1 Luck. 233 = 29 O.C. 218 = 3 O.W.N. Sup. 34 = A.I.R. 1926 Oudh 419.**

—S. 22—Relinquishment by widow.

———*Ineffective.*

Although S. 22 cannot be read as precluding a taluqdar's widow from relinquishing her estate so as to accelerate succession, a power of relinquishment cannot be ascribed to her on the analogy of the power possessed by a Hindu widow under Hindu Law, and there is nothing in Act I of 1869, or in the general principles of law, which seems to justify the extension of a doctrine of Hindu Law to taluqdar's widow.

The doctrine of surrender by a tenant for life under English Law cannot be applied to a taluqdar's widow. In her case there is no reversioner or remainderman having a vested interest. Under the Oudh Estates Act the next reversioner having no vested interest at all, the taluqdar's widow cannot, by surrender to him, cause a merger of her particular estate with the reversioner's greater future estate because the reversioner has no "estate" of any description, but merely an expectancy. Her relinquishment would be inoperative and the estate will vest in her whether she would or no. (*King, J.*) KRISHNAPAL *v.* SRI RAJ KAUR. **104 I.C. 299 = 1 L.C. 97 = A.I.R. 1927 Oudh 278.**

OUDH ESTATES ACT (1869), S. 23—Ordinary law.

—S. 22—Reversioner.

Plaintiff claiming declaration to reversionary title has to prove that he is nearest male agnate according to rule of lineal primogeniture. 20 Cal. 649 (P. C.) Dist. (*Stuart, C. J. and Wazir Hasan, J.*) KRISHNA PAL SINGH *v.* MT. RAJ KUNWAR. **118 I.C. 81 = 4 Luck. 225 = 6 O.W.N. 1341 = A.I.R. 1929 Oudh 475.**

—S. 22—Scope.

The sanad will control the provisions of clause 11 of S. 22. (*Dalal, J. C. and Neave, A. J. C.*) MOHAMMAD HASAN v. ALI HAIDER. **85 I.C. 509 = 12 O.L.J. 1 = 28 O.C. 8 = A.I.R. 1925 Oudh 337.**

—S. 22—Settled estate.

———*Oudh Settled Estates Act, S. 18 (2)—Oudh Estates Act, S. 22—Confirmed of a second life estate by will amounts to exclusion of heir-at-law from succession.*

Under Cl. (2) of S. 18 the extent to which the power of bequest given by law to the holder of a "settled estate" can be exercised is that he can make a bequest of the estate only to one person and to be held by him as an impartible estate and it must be made in favour of a person who is not a stranger within S. 18. He can exclude the heir-at-law by giving a life estate to a person who though not an heir-at-law is still an heir under any Clause of S. 22 of Act I of 1869, but beyond this he has no power to go. (*Gokaran Nath Misra, J.*) KRISHNA KUMARI DEBI *v.* RAJENDRA BAHADUR SINHA. **104 I.C. 155 = 2 Luck. 43 = 13 O.L.J. 846 = 6 O.W.N. 1150 = A.I.R. 1927 Oudh 240.**

—S. 22—Succession.

In the case of a taluqdar, entered in list II and holding a primogeniture sanad, the limitation contained in the sanad is superseded by Act I of 1869 and succession to his estate is governed under S. 22 (11), by his personal law, as modified by custom in the family, if any. Therefore, in the case of a Hindu taluqdar, the Hindu Law of the Mitakshara will apply and it is only when there are two or more persons entitled to succeed under Hindu Law that seniority of line or priority of birth have to be taken into account for determining the single heir: 5 I. A. 1 (P. C.) and 18 O. C. 289, Foll.; A. I. R. 1922 P. C. 289, Dist. (*King, J.*) KRISHNAPAL SINGH *v.* SRI RAJ KUAR. **104 I.C. 299 = 1 L.C. 97 = A.I.R. 1927 Oudh 278.**

—S. 22—Terms in sanad.

The Act cannot be taken to mean that when the Crown has granted an estate upon certain terms, then those terms are to hold good in perpetuity, and that the Crown is precluded from modifying those terms by subsequent legislation. S. 22 of Act I of 1869 did modify the rule of succession contained in the sanads, and the Crown Grants Act has not the effect of reviving the terms of the sanads: 18 O. C. 289, Foll. (*King, J.*) KRISHNAPAL SINGH *v.* SRI RAJ KUAR. **104 I.C. 299 = 1 L.C. 97 = A.I.R. 1927 Oudh 278.**

—S. 22—Vesting of remainder.

The vesting of a remainder, which is borrowed from English Law, does not find a place in the devolution of property settled under S. 22 of Act, I of 1869. The principle is the same whether the parties are Hindus or Mussalmans. (*Dalal, J. C. and Neave, A. J. C.*) MOHAMMAD HASAN *v.* ALI HAIDER. **85 I.C. 509 = 12 O.L.J. 1 = 28 O.C. 8 = A.I.R. 1925 Oudh 337.**

—S. 23—Ordinary law.

The "ordinary law" referred to in the Act is the law which would govern the parties apart from the statute aud includes any *sanad* giving title to the property in dispute. The terms of S. 23 are precisely similar to those of S. 22 (11), and there is no suffi-

OUDH ESTATES ACT (1869), S. 24—Charge on Estates.

cient reason for giving to them a different construction. 20 Cal. 649, (P. C.); 32 All. 599, (P. C.); A. I. R. 1921 P. C. 14, followed: 5 I. A. 1 (P.C.); 31 All. 457. (P. C.) dissented from. (*Viscount Cave.*) BADRI NARAIN SINGH *v.* HARNAM KUAR. **68 I.C. 1000=44 All. 449=9 O.L.J. 428=31 M.L.T. 195=49 I.A. 276=27 C.W.N. 129=21 A.L.J. 13=25 O.C. 313=37 C.L.J. 306=4 L.R.P.C. 10=A.I.R. 1922 P.C. 289=44 M.L.J. 337 (P.C.)**

—S. 24—Charge on estate.

The fact that allowance has been enjoyed for more than three-quarters of a century and had been received during all that time out of the income of certain lands with the acquiescence of successive holders is a fact which goes to justify the conclusion that there is valid grant of maintenance which is a charge on those lands : 30 Mad. 203 and A. I. R. 1918 P. C. 156, Foll.; A. I. R. 1920 P. C. 16, Not Foll. (*Stuart, C. J. and Raza, J.*) DY. COMMR. *v.* MT. MUNNI. **110 I.C. 56=5 O.W.N. 202=3 Luck. 446=A.I.R. 1929 Oudh 80.**

—S. 29—Re-Marriage.

The word "widow", as used in S. 29, Oudh Estates Act, means, "a woman whose husband has died and who has not been married to any other man." If, therefore, a widow of a Mahomedan taluqdar is given by her husband a power to adopt she must exercise that power while she is his widow. If she has ceased to be his widow by her remarriage with another man, the power given to her can no more be exercised by her. The widow of a Mahomedan taluqdar must be considered to be civilly dead, if she remarries herself, so far as her power to adopt is concerned. (*Gokaran Nath Misra, J.*) ABDUL HALIM KHAN *v.* SOODAT ALI KHAN. **108 I. C. 817=1 L.C. 733=A.I.R. 1928 Oudh 155.**

—S. 32—Applicability.

Section 32 (a) does not apply to the acquisition of fresh rights in a property which already forms part of the taluka, and a failure to execute such an instrument does not imply that the property purchased by a taluqdar without the execution of such an instrument did not become part of the estate. A purchase of this kind by a taluqdar would ordinarily be held for the benefit of the estate and unless the taluqdar intended to keep alive such a title, there is a merger and the purchase by taluqdar of under-proprietary rights will go with the estate. (*Pullan, J.*) MAHOMED ALI KHAN *v.* NISAR ALI KHAN. **109 I.C. 835=1 L.C. 592=A.I.R. 1928 Oudh 67.**

—S. 32-A—Acquisition to estate.

Where the holder of an "estate" within the meaning of the Act makes acquisitions to such "estate" subsequent to the passing of the Act, he is not competent, otherwise than by a declaration made under S. 32-A to make the acquisitions also descend along with the "estate" under S. 22 of the Act : 27 All. 634 (P.C.); A.I.R. 1918 P. C. 25, Rel. on.; 29 Cal. 433 (P. C.) ;35 All. 391 (P. C.) and A. I. R. 1916 (P, C.) 89, Dist. (*Stuart, C. J. and Raza, J.*) MIRZA MD. SADIQ *v.* FAKHR JAHAN BEGAM. **117 I. C. 385=3 Luck. 521=6 O.W.N.1251=A.I.R. 1929 Oudh 97.**

—S. 33—Scope.

Award of British Indian Association made in 1867 but not filed in Court within six months is outside the scope of S. 33: (*Stuart, C. J. and Hasan, J.*) LAL MUNESHAR BAKHSH *v.* RAM NATH. **100 I. C. 805=2 Luck. 452=4 O.W.N. 209=A.I.R. 1927 Oudh 142.**

———The awards of the British Indian Association, whether strictly falling within the purview of S. 33 or not, are always to be construed by the Courts in Oudh as making provision for the maintenance of the relatives of taluqdars and not deciding questions of title to lands : 23 Cal. 838 (P. C.) and 29 All. 519, (P.C.) Rel. on. (*Stuart, C. J. and Hasan, J.*) LAL MUNESHAR BAKHSH *v.* RAM NATH. **100 I. C. 805=2 Luck. 452=4 O.W.N. 209=A.I.R. 1927 Oudh 142.**

—Sch. 1—Effect of proclamation.

The effect of the letters of the Government of India dated the 10th and 19th October 1859, appended as Sch. 1 to the Oudh Estates Act, is not to restore all under-proprietary rights which existed before the annexation of Oudh. Before such a right can be relied on, it must be shown that it has been recognised by the Government after the date of Lord Canning's proclamation, either by an entry in the settlement records or by a settlement decree or in some other way. (*Daniels, J. C.*). MD. RASHIDUDDIN ASHRAF *v.* RAM SUKH. **65 I. C. 514=24 O. C. 342=A.I.R. 1921 Oudh 205.**

OUDH ESTATES (AMENDMENT) ACT (III of 1910).

—S. 6—Retrospective effect.

Section 6 is not retrospective and does not validate a bequest which had already failed. (*Mr. Ameer Ali.*) (KUAR) MATA PRASAD *v.* (KUAR) NAGESHAR SAHAI. **91 I.C. 370=6 L.R.P.C. 195=3 O.W.N. 1=28 O.C. 352=52 I.A. 398=24 A.L.J. 1=47 All. 883=1926 M.W.N. 83=43 C.L.J. 51=13 O.L.J. 19=28 Bom. L.R. 1110=30 C.W,N. 626=A.I.R. 1925 P.C. 272=50 M.L.J. 18 (P.C.)**

OUDH JUDICIAL COMMISSIONER'S COURT RULES.

—Pt. 4, Rr. 27, 5 and 6—Evidence to be printed.

No party can dictate to his opponent what evidence the latter shall get printed. (*Daniels J. C. and Dalal, A.J.C.*) MUMTAZ-UN-NISA BEGUM *v.* WAZIR ALI. **65 I.C. 308=8 O.L.J. 569=A.I.R. 1921 Oudh 242.**

OUDH LAND REVENUE ACT (XVII of 1876) [SINCE REPEALED BY U. P. LAND REVENUE ACT, III of 1901.]

—S. 16—Jamabandi and Khatauni.

Jamabandi and khatauni prepared at the last and first settlement respectively—Entries in, as regards rental, must be presumed to be correct until contrary is proved. (*Wazir Hasan, J.*) JANG BAHADUR SINGH *v.* SATNARAIN SINGH. **103 I.C. 762=4 O.W.N. 681=A.I.R. 1927 Oudh 325.**

—S. 40—Pre-emption.

———*Oudh Laws Act, S. 7.*

Under S. 7 of the Oudh Laws Act, read with S. 40 of the Oudh Land Revenue Act (XVII of 1876) the right of pre-emption should be presumed to exist not but only in the case of under-proprietary communities, but also in the case of communities constituted by the holders of leases, which are transferable subject to the landlord's interference and are heritable. (*Pullan and Ashworth, A. J. Cs.*) LACHHMIPAL SINGH *v.* BHAGWAT SINGH. **85 I.C. 468=A.I.R. 1925 Oudh 527.**

—S. 133—Birtdari tenure.

A birtdari tenure judicially affirmed by a decree of Court is neither an incumbrance, nor a grant, nor a contract within S. 133. That it may have originated in a grant or a contract is wholly immaterial. The grant or the contract, as the case may be, has merged into the decree of the Court and the title on which the tenure rests is the decree of the Court only : 23 O.C. 25 and A.I.R. 1926 Oudh 277, Foll. (*Stuart, C. J. and Wazir Hasan, J.*) KAMPTA SIROMANPAL

OUDH LAND REVENUE ACT (1876), S. 133—Sale under.

v. RAMSWARUP PANDEY. **101 I.C. 285=2 Luck. 475=4 O W.N. 277=A.I.R. 1927 Oudh. 202.**

—S. 133—Sale under.

The consequences which shall ensure from sale taking place for the satisfaction of a decree for an arrear of rent under the provisions of S. 125 of the Oudh Rent Act are widely different from the consequences which are to ensue from a sale of land for an arrear of land revenue and which are defined by S. 133 of the Oudh Land Revenue Act, and the fact that the last clause of S. 125 invests the Deputy Commissioner with the power of selling the land in satisfaction of a decree for an arrear of rent as he might have exercised for the recovery of an arrear of revenue does not by any means lead to the conclusion that the consequences of the two sales shall also be the same. (*Stuart, C. J. and Wazir Hasan, J.*) KAMPTA SIROMAN PRASAD *v.* RAMSWARUP PANDEY. **101 I.C. 285=4 O.W.N. 277=2 Luck 475=A.I..R. 1927 Oudh 202.**

———The effect of a sale held under S. 125 of the Oudh Rent Act read with S. 133 of the Oudh Land Revenue Act would be only to destroy the rights of the under-proprietor against whom a decree has been passed and of those who held by virtue of a grant or contract previously made by those under-proprietors, but not the rights of other persons not in any way connected with the judgment-debtors. (*Gokaran Nath Misra and Raza, JJ.*). KAMTA SIROMAN *v.* MATA BALAL. **99 I.C. 391=3 O.W.N. (Sup.) 266=8 L.R.A. Rev. O. 37=A.I.R. 1927 Oudh 72.**

—S. 172—Powers of Court of Wards.

———*When its action can be impeached.*

The Court of Wards can act on behalf of a ward in the conduct of a suit or an appeal and it has power to settle disputes between its wards where there are more wards than one by an arrangement of the nature of a compromise either in or out of Court.

Where it is established that the Court of Wards has done an act after having directed its mind as to the question whether the act is for the benefit of the property and the advantage of the disqualified proprietors and has decided that such an act is for the benefit of the property and the advantage of the disqualified proprietors, a ward is not in the position on attaining majority to challenge the validity of the act upon the ground that the act was not to his benefit or to the benefit of the property. If he were able to establish fraud or misconduct on the part of the Court of Wards, the action would not protect the Court of Wards; for if fraud or misconduct were established the Court of Wards could not have judged the act to be "most for the benefit of the property and the advantage of the disqualified proprietors:" 23 All. 394 P. C., Expl. and Cons. (*Stuart, C.J. and Ashworth, J.*). COURT OF WARDS *v.* CHANDRA BHAN DAT. **97 I.C. 520=13 O.L.J. 343=3 O.W.N. Sup. 185=A.I.R. 1926 Oudh 530.**

—S. 173—Scope.

Section is not confined to interest taking effect immediately. (*Daniels and Wazir Hasan, A.J.Cs.*) RADHA KISHEN *v.* JAMNA PRASAD. **61 I.C. 956=8 O.L.J. 127=A.I.R. 1921 Oudh 52.**

OUDH LAWS ACT (XVIII of 1876).

—Interpretation.

Per *Wazir Hasan, Ag. C.J.* —When the terms of a statute are clear it is contrary to principles of interpretation to first conceive the intention of the legislature in enacting a statute and then to construe it in accordance with that intention: *Leader* v. *Duffy*, (1888) 13 A.C. 294 and *Bank of England* v. *Vagliano Brothers*. (1891) A.C. 107 Rel. on.

The provisions of Oudh Laws Act, therefore cannot be construed in the light of the rules of the Mahomedan Law in the matter of pre-emption which might have been in force previous to the passing of the Act or in the light of an assumed intention of the legislature. (*Wazir Hasan, Ag. C.J., Misra and Pullan, JJ.*) GAYA PRASAD *v.* S. FAIYAZ HUSSAIN. **5 Luck 12=A.I.R. 1930 Oudh 274 (F.B.).**

—Object.

There is nothing in the Oudh Laws Act which suggests that the objects of the law of pre-emption is to exclude a stranger. (*Wazir Hasan, C.J. and Pullan, J.*) BASDEO *v.* INDAR BIKRAM SINGH. **7 O.W.N. 835=A.I.R. 1930 Oudh 428.**

—S. 3—Custom.

A plea of custom may be entertained in modification of the personal law, Hindu law or Mahomedan law, but not in entire abrogation of such law. (*Stuart and Wazir Hasan, JJ.*) MILARSEN SINGH *v.* MOKBHUL HUSAIN. **107 I.C. 890=3 Luck 154=4 O.W.N. 1243=A.I.R. 1928 Oudh 138.**

—S. 3—Gift.

A gift in trust to the son should be considered as a gift within the meaning of section 3 of the Oudh Laws Act and as such, to be operative must comply with the conditions prescribed by Mohammedan law. 19 O.C. 192, Foll. (*Ashworth, and Simpson, A. J. Cs.*) SHARF-UZ-ZAMAN *v.* SIR HENRY STANYON. **70 I.C. 253=25 O.C. 291=10 O.L.J. 491=A.I.R. 1923 Oudh 80.**

—S. 4—Right of Privacy.

———*Judicial Notice of.*

There is a customary right of privacy prevailing in Oudh which is so well established and known, as not to require proof, in any case, by a party setting it up and the Court itself may take judicial notice of the custom. 10 All. 358, Rel. on. (*Ashworth, J.*) BUGRIDI *v.* RAHIM BUX. **93 I.C. 332=13 O.L.J. 512=A.I.R. 1926 Oudh 352.**

—S. 5—Amount of Dower.

Section 5 lays down that the dower to be allowed by the Court shall be reasonable with reference to the means of the husband and the status of the wife. In determining what amount would be reasonable considering the means of the husband, the Court has to look to the means of the husband at the present time when the contract is sought to be enforced and not to his means at the time when the contract was entered into. (*Gokaran-Nath Misra and Shrivastava, J.J.*) MT. NAUROSI *v.* MD. NOOR KHAN. **113 I.C. 81=5 O.W.N. 1031=4 Luck 193=A.I.R. 1929 Oudh 32.**

———No hard and fast rule can be laid down as to the amount of dower—Extent and nature of claims of other heirs must be considered. 7 O. C. 176; 16 O. C. 325; 19 O. C. 246 and 21 Cal. 135, P. C. Appl. (*Neave, A. J. C.*) MT. ALIA BIBI *v.* MT. AMALIA BIBI. **89 I.C. 672=A.I.R. 1926 Oudh 128.**

———Where the assets left by the husband were about Rs. 12,000 while the dower settled at the time of the marriage was Rs. 70,000 and the widow was childless.

Held, that Rs. 4,000, *i.e.*, about one third of the assets was an equitable amount. (*Kanhaiya Lal, J.C.*) AMJAD HUSSAIN *v.* MT. UMMATUL ASKARI. **79 I.C. 644=10 O.L.J. 409=A. I. R. 1924 Oudh 232.**

—S. 5—Transfer in lieu of Dower.

When a Muhammadan husband has promised a

OUDH LAWS ACT (1876), Part. III, Ch. II (Ss. 6 to 15) Incumbrances.

certain amount of dower, the facts that under S. 5 of the Oudh Laws Act only a less amount would have been decreed if the matter had come before the Courts and that such amount had been already realised by the wife and that even otherwise the claim to the balance of the amount had become barred at the time, cannot invalidate a transfer of property by the husband to the wife in lieu of a portion of the balance. (*Wazir Hasan, A. J. C.*) MT. ZOHFA BIBI *v.* GANESH PRASAD **78 I.C. 106= A.I.R. 1925 Oudh 267.**

—Part III, Ch. II (Ss. 6 to 15)—Incumbrances.

Where a property subject to a right of pre-emption is sold and after the sale the vendee pays off incumbrances on that property this payment ought to be included in the purchase money specified in the decree for pre-emption: 2 I. A. 7, Ref.

The pre-emption decree may be moulded in accordance with the justice of the case. 17 O. C. 379 Ref.

The general principle is that a plaintiff suing for possession will not obtain an unconditional decree in cases, where the party in possession has satisfied an incumbrance subsisting upon the estate at the time he came into possession, which otherwise the plaintiff himself would have to meet. There may be cases in which a Court would hold that the vendee had paid off encumbrance in bad faith or improvidently, and would refuse to add this payment to the money payable under the pre-emption decree: or the interests of third parties may be involved. The general rule does apply to pre-emption decrees like other decrees for possession of property. (*Dalal and Simpson, A.J.Cs,*) BALDEO SINGH *v.* DEPUTY COMMISSIONER, KHERI, **74 I. C. 503=10 O. L. J. 112= A.I.R. 1924 Oudh 1.**

—S. 6.—Rights and Liabilities.

Per *Wazir Hasan, Ag. C. J.*—When property which carries with it the right of pre-emption passes from one person to another the right also passes with it and the new holder of the property acquires the status of a co-sharer which his predecessor had possessed. Similarly when the property which bears the burden of pre-emption is transferred by any of the various modes of acquisition of the property known to law, gift purchase, devise or inheritance, the burden is also transferred with it. The last vendee in a chain of successive vendees of a property which bears the burden of pre-emption is, therefore, as liable to deliver the property to the legitimate pre-emptor as is the first vendee. (*Wazir Hasan, Ag. C. J. Misra and Pullan, JJ.*) GAYA PROSAD *v.* S. FAIYAZ HUSSAIN. **5 Luck. 12=A.I.R. 1930 Oudh 274 (F.B)**

—S. 6—Right, when arises.

Under the Oudh Laws Act, a right of pre-emption arises only when a person proposes to sell any property or when he forecloses a mortgage upon any property and in order to ascertain in any particular cases whether a right of pre-emption existed, it is necessary first to see whether there had been a sale or the foreclosure of a mortgage. (*Stuart C.J., and Wazir Hasan J.*) OUDH BEHARI *v.* AMESHWAR SINGH **101 I.C. 193=4 O.W.N. 231= A.I.R. 1927 Oudh 161.**

——The question, whether a sale is a genuine sale or a mere sale of a share in a law suit, is one to be determined on the facts of the case. It is not correct to say that no sale can be the subject of pre-emption where legal procee dings are necessary to obtain possession of the property. Where a sale deed definitely purports to sell not a share in a law suit, but a share in a property to which the vendor is definitely

OUDH LAWS ACT (1876), S. 7—Waiver.

and clearly states his title the sale is subject to pre-emption, even though the sale is made for the purpose of raising funds to recover the property by litigation. It cannot be said that no right of pre-emption arises in any case in which the vendor was out of possession and litigation would be necesary to recover possession of the property. (*Daniels, A. J. C.*) GAJADHAR PRASAD *v.* MANRAKHAN. **66 I.C. 684= 8 O.L.J. 403= A.I.R. 1922 Oudh 156.**

—S. 7.—Non-transferable lease.

——*Pre-emption.*

Under S. 7 of the Oudh Laws Act, read with S. 40 of the Oudh Land Revenue Act (XVII of 1876) the right of pre-emption should be presumed to exist not only in the case of under-proprietary communities, but also in the case of communities constituted by the holders of leases, which are transferable subject to the landlord's interference and are heritable. (*Pullan and Ashworthi A. J. Cs.*) LACHMIPAL SINGH *v.* BAGWAT SINGH. **85 I.C. 468= A.I.R. 1925 Oudh 527.**

—S. 7—Right of under-proprietors to pre-empt.

Under-proprietors have a right under the Oudh Laws Act, to pre-empt a sale of proprietary tenure. Their right however comes subsequent to that of the co-sharers. Where there are no co-sharers they will have an immediate right. (*Hasan, C.J. and Pullan, J.*) BASDEO *v.* BIR INDAR BIKRAM SINGH. **7 O.W.N. 833=A.I.R. 1930 Oudh 468.**

—S. 7.—Right when arises.

Village community is necessary condition for a custom of pre-emption—Waste lands purchased for cultivation and inhabitation—Lands sold in distinct blocks to different persons—Neither the original purchaser nor purchasers from him form a village community.

The Act (XVIII of 1876) did not in any sense purport to create a right of pre-emption. It merely recognised the custom already prevailing and laid down that a particular custom of pre-emption was to be presumed, unless there was a custom or contract to the contrary, but that such right of pre-emption could only exist where there was a village community. (*Stuart, C. J. and Raza, J.*) PATESHWARI PARTAB NARAIN *v.* MOHED MUMTAZ ALI KHAN.

102 I.C. 307=1 L. C. 10=A.I.R. 1927 Oudh 227.

—S. 7—'Transferable rights'.

"Transferable rights" only refer to subject-matter of a transfer and not to its mode. (*Stuart, C.J., and Wazir Hasan, J.*) OUDH BEHARI *v.* AMESHWAR SINGH. **101 I.C. 193=4 O.W.N. 231= A.I.R. 1927 Oudh 161.**

—S. 7—Waiver.

A village was originally granted to one *C*. The original grantee died and the estate vested in pursuance of his will to ten persons living in England. The owners being desirous of disposing of the property it was divided into a number of blocks which were offered for sale locally. One block was purchased by *P*. Another block was purchased by one *D* and *M* few hours after *P's* purchase and some days afterwards some other blocks were purchased by *M*. The agreement to sell, however, was entered into prior to the agreement of *P*. The blocks were in the market for sometime. They were clearly delineated upon separate plans and separate khasras and Jamabhandis were prepared for each. *P* had procured a list of all the blocks containing the prices. He knew that they were all in the market and could be had for the prices mentioned. *P* had expressed his desire to purchase the blocks adjacent to his estate only and that he did not wish to purchase any other block.

OUDH LAWS ACT (1876) S. 7—Wajib-ul-arz.

Held: that *P* under the circumstances must be taken by his conduct to have waived his right of pre-emption and that it would be inequitable to allow him to re-assert it: 5 O.C. 395; 10 O.C. 257; 22 O.C. 323, Ref. (*Sir George Lowndes*). PATESWARI PRATAP NARAIN *v.* SITARAM. **119 I.C. 627 = 6 O.W.N 763 = 56 I.A. 356 = 50 C.L.J. 555 = 4 Luck. 421 = 1929 M.W.N. 926 = 30 M.L.W. 885 = A.I.R. 1929 P.C. 259 = 57 M.L.J. 637 (P.C.)**

—S. 7—Wajib-ul-arz.

Wajib-ul-arz at the first settlement contains a clear entry to the effect that every co-sharer has power to sell or mortgage his share to whomsoever he likes. The subsequent wajib-ul-arz prepared at the time of partition contains an entry to the effect that all co-sharers have power to sell or mortgage their shares.

Held: that the omission of words "to whomsoever he likes" from the second wajib-ul-arz does not imply that the custom of excluding the right of pre-emption was abrogated by the second wajib-ul-arz: A.I.R. 1923 P.C. 90, Rel. on; 22 O.C. 20; 20 O.C. 226; and A.I.R. 1924 Oudh 382; Dist. (*Raza and Nanavutty JJ.*) KARIM KHAN *v.* FARZAND ALI. **111 I.C. 31 = A.I.R 1928 Oudh 498.**

—S. 8—Pre-emption in city.

Section 8 clearly allows the right of pre-emption to exist in a town and even in a city. It only lays down that such a right must not be presumed to exist. (*Raza and Pullan, JJ.*) FASAHAT HUSAIN *v.* MD., ZAMIN. **118 I.C. 801 = 6 O.W.N. 277 = A.I.R. 1929 Oudh 301.**

—S. 9—Burden of proof.

If the pre-emptor claims a preferential right under S. 9, Cl. (2), the onus lies upon him to establish that there is an under-proprietary mahal of which he is a co-sharer. (*Pullan and Srivastava, JJ.*) MOHAMMAD SHARIF KHAN *v.* ACHHAIBAR DUBEY. **7 O.W.N. 99 = A.I.R. 1930 Oudh 90.**

—S. 9.—Changes pending suit.

The Oudh Laws Act never suggests that any persons who had the rights of pre-emption on the grounds given therein can subsequently in course of a suit lose those rights on proof of some act of another which he could not in any manner prevent.

A co-sharer therefore cannot defeat the suit brought by a pre-emptor by acquiring the position of a co-sharer during the pendency of the suit : A.I.R. 1930 Oudh 274, Foll.; A.I.R. 1929 Oudh 313, Diss. from. (*Wazir Hasan, C.J., and Pullan, J.*) BASDEO *v.* INDAR BIKRAM SINGH. **7 O.W.N. 835 = A.I.R. 1930 Oudh 428.**

—S. 9—Co-sharer.

To be co-sharer person need not be so recorded. 19 O.C. 306 and 7 All. 184 (F.B.), Rel. on. (*Wazir Hasan, Ag. C.J., Misra and Pullan, JJ.*) HIWANCHAL SINGH *v.* AJODHYA SINGH. **115 I.C. 433 = 6 O.W.N. 374 = 4 Luck. 370 = A.I.R. 1929 Oudh 265.**

———In order to determine whether a person is a co-sharer or not, the test is the liability to pay Government revenue : 26 All. 574 (P.C.) and 28 All. 246, Foll.: 10 O. C. 86, Diss. from.: 10 O. C. 225; 16 All. 412 and 10 O.C. 257, discussed. (*Stuart, C.J., and Raza, J.*) BACHCHU LAL *v.* CHHANGA LAL. **105 I.C. 590 = 4 O.W.N. 995 = A.I.R. 1927 Oudh 514.**

—S. 9—Equal rights.

———*Casting lots.*

Where in a suit for pre-emption plaintiff and the vendee had an equal right of pre-emption in respect of a certain property the trial Court, acting on this finding drew lots under S. 9. The plaintiff being successful in the lots the losing party appealed.

OUDH LAWS ACT (1876). S. 9—Joint Hindu family.

Held : that S. 9, Oudh Laws Act, was correctly interpreted and that a Court in a case of this kind was bound to have recourse to lots : 3 O.C. 330, Foll. (*Pullan, J.*) RAM SUKH DUBE *v.* RAMPAT TEWARI. **107 I.C. 879 = 5 O.W.N. 82 = A.I.R. 1928 Oudh 218.**

— S. 9—Essentials for right.

No right to pre-empt has ever been held to exist in Oudh, whether under a custom recorded in the wajib-ul-arz or under the Oudh Laws Act, in a person, who has got no proprietary right in the village. Relationship alone is not considered to be sufficient to confer a right of pre-emption on any individual. The person claiming the right by relationship must be a co-sharer in the village. (*Stuart, C.J., and Misra, J.*) MAHESH BAKSH SINGH *v.* BALADDIN SHAH. **105 I.C. 136 = 4 O.W.N. 787 = A.I.R. 1927 Oudh 367.**

—S. 9—Hiba-bil-ewaz.

It is not competent for the Courts of law to thwart the express intention of the parties and to convert a transaction of hiba-bil-ewaz into one of sale so as to attract to it a claim for pre-emption under the Oudh Laws Act. (*Wazir Hasan and Raza, JJ.*) BASHIR AHMED *v.* MT. LUBAIDA KHATUN. **92 I.C. 265 = 1 Luck. 83 = 29 O.C. 108 = 3 O.W.N. 105 = A.I.R. 1926 Oudh 186.**

—S. 9—Independent khatas.

If every *khata* in the village is distinct without any joint right or joint obligation with the other *khatas* every *khata* would be in the position of a separate *mohal* and the co-sharers of every *khata* would be separate and independent. Under these circumstances among the parties who are members of the village community so far as the right of pre-emption is concerned no right of preference is given on account of relationship. 22 O. C. 97 Cons. (*Dalal, A. J. C.*) RAM ADHIR *v.* GAYA PRASAD. **77 I.C. 771 = A.I.R. 1923 Oudh 159.**

—S. 9—Joint Hindu Family.

It is open to a member of a joint Hindu family to acquire by pre-emption a portion of the property belonging to the joint family of which he happens to be member, when the said property has been sold by the manager of the family. The question of family property is immaterial, because by making a claim for pre-emption the co-sharer is precluded from disputing the validity of the sale on the ground that it was not for family necessity: 67 I. C. 76; 42 All. 264 and A. I. R. 1925 Oudh. 352, not Foll.; A. I. R. 1922 Oudh 115; 1 O. C. 252; 7 O. C. 61 Foll.; A.I.R. 1918 P. C. 196-19 O.C. 306 and 7 All. 184 (F. B.), Ref. (*Wazir Hasan, Ag. C. J. and Misra and Pullan, JJ.*) HIWANCHAL SINGH *v.* AJODHYA SINGH. **115 I. C. 433 = 6 O. W. N. 374 = 4 Luck. 370 = A. I. R. 1929 Oudh 265 (F.B.)**

———(*Dalal, Offg. J. C. Dissenting*).—Where a foreclosure decree is passed against some members of a Hindu joint family without making the others parties and the joint family owns property other than that foreclosed, the members not made parties are not "co-sharers," entitled to pre-empt the property within the meaning of S. 9. (*Daniels, J. C. . Dalal, Offg, J. C. and Ashworth, A, J. C.*) GAJADHAR *v.* LAL BEHARI. **88 I. C. 879 = 12 O. L. J. 202 = 2 O. W. N. 264 = 28 O. C. 139 = A. I. R. 1925 Oudh 332.**

———When a joint Hindu family property is sold by one of the members of the family a suit for pre emption by another member of the same family is mainta-

OUDH LAWS ACT (1876), S. 9—Member of Village Community.

nable. (*Wazir Hasan, A. J. C.*) RAM ADHIN SINGH *v.* SURAJPAL SINGH. **65 I. C. 772 = 25 O. C. 57 = 8 O. L. J. 506 = A. I. R. 1922 Oudh 115.**

—S. 9—Member of village community.

Quaere.—Whether mere purchase of the rights of the superior proprietor *ipso facto* makes the purchaser a member of village community. (*Wazir Hasan, C. J., and Pullan, J.*) BASDEO *v.* INDAR BIKRAM SINGH. **7 O.W.N. 835 = A.I.R. 1930 Oudh 428.**

———A "village community" under the Oudh Laws Act consists of the whole body of persons possessing rights as proprietors, under proprietors or heritable lessees in village lands.

Four mahals were amalgamated as a fiscal whole, *i. e*, though each Mahal was separately assessed to land-revenue, yet default of land-revenue over any Mahal could be recovered from a sharer in any one of the Mahals.

Held: that there was one village community for the whole of the four mahals and a sharer in any one of the Mahals was a member of that village community: 12 O. C. 1, Rel. on. (*Stuart, C. J. and Raza, J.*) ASHGAR HUSAIN *v.* SARDAR HUSAIN. **112 I. C. 408 = 5 O. W. N. 947 = A.I.R. 1928 Oudh 501.**

———In the matter of pre-emption ownership of land is the one condition of membership of the village community for the purpose of S. 9. It does not matter if the land consists of one plot only on which no revenue is assessed. The payment of revenue cannot be the criterion for proof of share in the village or of ownership of land. The owner of a grove who owns the land underneath is therefore entitled to be considered a member of the village community. 7 O.C. 275; 10 O.C. 225; 10 O.C. 86, Foll., and 13 O.C. 202, Dist. (*Dalal, A.J.C.*) KANHAYA BAKHSH SINGH *v.* SHEO NATH. **87 I.C. 956 = A.I.R. 1925 Oudh 665.**

—S. 9—Relationship.

The words "in order of their relationship" in S. 9 (1) do not refer only to such a class of persons amongst whom, on the fiction that the vendor was dead and the inheritance opened on the date of the sale, the heir or the heirs of the vendor exist. Those words simply mean "according to the degree in the line of relationship" with the vendor. The circle of relationship is much wider than the circle covering the heir or the heirs only, and in the law of pre-emption as enacted in the provision of Chap. 2, Oudh Laws Act, 1876, there is nothing to justify the Courts to interpret "in order of their relationship" in the restricted sense, 74 P. R. 1906, Diss. from.

Nearness in degree of relationship is the only test for determining the preferential right to pre-emption. But the relationship mentioned in S. 9 means consanguinity from a common stock. The law clearly requires the selection of one person of the nearest degree or by lot where there are several persons of equal degree in relationship to the vendor for the purpose of giving preferential right to buy. This, in the very nature of things, implies that the competitors and the vendors are descended from a common stock: 14 O.C. 193; 4 O.C. 397; and 7 O.C. 6 Foll.

Where the vendee is the son of the vendor's father's brother and the pre-emptor is the brother of the vendor's mother, but both are co-sharers, the pre-emptor is not nearer in degree to the vendee and he cannot, therefore, succeed. (*Wazir Hasan and Gokaran Nath Misra, JJ.*) ABDUL RAHMAN BEG *v.* BARKAT BEG. **105 I.C. 210 = 4 O.W.N. 866 = A.I.R. 1927 Oudh 474.**

OUDH LAWS ACT (1876), S. 9—Several villages in Mahal.

—S. 9—Right when arises.

A share in a law suit does not give rise to a claim for pre-emption.

Where the property in suit is not in the possession of the vendor, the sale of a right which has to be established by litigation does not give rise to a right of pre-emption.

Where an agreement was entered into between a vendor and a vendee by which the latter undertook to meet the costs of litigation, the amount of which was uncertain, in consideration of receiving half the property in the event of success, no money having been paid by the vendee in cash.

Held: that what was transferred to the vendee was a share in a law suit and not a share in a proprietary tenancy and that therefore it did not give rise to a right of pre-emption. 21 I. A. 26, Foll. and 6 O. L. J. 29; 7 O. L. J. 64; A. I. R. 1922 Oudh 156, Dis. (*Kendall, A. J. C.*) AJUDHIYA PRASAD *v.* RAM AUTAR. **80 I.C. 83 = A.I.R. 1925 Oudh 253.**

———Where A who was entitled to pre-empt had agreed with B, a stranger to transfer his (A's) interest in the pre-empted property after pre-emption, and both A and B sued as plaintiffs for pre-emption.

Held, that though B was subsequently left out of the suit yet as a man cannot be allowed to do by indirect means what is forbidden to be done directly A also should not be allowed to pre-empt because the result in that case would be that B would get the property in preference to the vendee. (1 O. C. 308, Foll.) (*Wazir Hasan, J. C. and Neave, A. J. C.*) SARABJIT SINGH *v.* JAIKARAM SINGH. **79 I.C. 950 = 27 O.C. 137 = 11 O.L.J. 423 = A.I.R. 1924 Oudh 420.**

—S. 9—Scope.

Section 9 is applicable not only where there are persons equally entitled to buy a property and the property has been sold to a stranger, or to a person whose right to acquire it is inferior to that of the persons who are equally entitled to pre-empt, but is applicable also to cases where two or more persons are equally entitled to buy the property and one or more of them has or have acquired it: 13 O. C. 260. Ref. (*Raza, J.*) MD. SHER KHAN *v.* LAL BAHADUR KHAN. **117 I.C. 454 = 6 O.W.N. 437 = A.I.R. 1929 Oudh 313.**

———In a suit for pre-emption in respect of property conveyed to the defendant by the Government for a nominal consideration,

Held: that as the deed of transfer had an outstanding element of grant by the Crown, the transfer is not a sale pure and simple and hence no right of pre-emption was exercisable over the property. (*Stuart, C. J. and Wazir Hasan, J.*) MATA GULAM SINGH *v.* KALIDIN SINGH. **100 I.C. 637 = A.I.R. 1927 Oudh 207.**

———Section 9 of the Oudh Laws Act will allow a right of pre-emption to be exercised by a co-sharer of the sub-division of a tenure resuslting from a lease, which is non-transferable except subject to the lessor's interference and which is heritable.

The sub-divisions contemplated by S. 9 are units bearing the relation one to another of having been called into existence by one and the same act or event of sub-division, whatever be the purpose of such sub-division. (*Pullan and Ashworth, A.J.Cs.*) LACHMIPAL SINGH *v.* BHAGWAT SINGH. **85 I.C. 468 = A.I.R. 1925 Oudh 527.**

—S. 9—Several villages in Mahal.

In the case of mahals which comprise a great number of villages, all the inhabitants of the mahals do not become members of one village community within

OUDH LAWS ACT (1876), S. 9—Under-proprietary interest.

the meaning of S. 9 (3). There may be many village communities comprised in a mahal. It is not therefore possible for members of one village community to sue for the pre-emption of the whole Mahal as no right of pre-emption outside the village to which they belong is given to them. (*Wazir Hasan, C.J. and Pullan, J.*) BASDEO *v.* INDAR BIKRAM SINGH.

7 O.W.N. 835 = A.I.R. 1930 Oudh 428.

—S. 9—Under-proprietary interest.

Where in the case of a sale of an under-proprietary interest in the village there is competition between the vendee who is a superior proprietor and a pre-emptor who holds under-proprietary rights, the pre-emptor and the vendee are both members of the village community and are equally entitled to claim the property under S. 9 (3): 9 O C. 271 and A.I.R. 1927 Oudh. 124 Rel. on.; 5 O.C. 266, not Foll. (*Pullan and Srivastava, JJ.*) MOHAMMAD SHARIF KHAN *v.* ACHAIBAR DUBEY. **7 O.W.N 99 = A.I.R. 1930 Oudh 90.**

—S. 9—Under-proprietors.

Where there are no co-sharers which is the case when the whole mahal is sold, the under-proprietors have a right of pre-emption as being members of village community. (*Wazir Hasan, C. J. and Pullan, J.*) BASDEO *v.* INDAR BIKRAM SINGH.

7 O.W.N. 835. = A.I.R. 1930 Oudh. 428.

——When a proprietary tenure is sold, an under-proprietor would not come within cl. 2 of co-sharers of the whole *mahal*. Only the proprietor would come within cl. 2. The under-proprietors would come within cl. 3 as members of the village community.

The tenure which had been sold was a proprietary tenure. There was only one *mahal* in which the plaintiff pre-emptor was a co-sharer of proprietary rights and the vendees were under-proprietors.

Held : that the plaintiff had a preferential right of pre-emption. (*Dalal, J.C.*) NASRULLAH KHAN *v.* ABDUL HAMID. **89 I.C. 537 = 2 O.W.N. 452 = 12 O.L.J. 562 = A.I.R. 1925 Oudh 538.**

——Under Section 9 of the Oudh Laws Act an under proprietary tenure may be any area of land whether constituting an entire Mahal or only a small portion thereof. Where the vendor and the pre-emptor are co-sharers in an under-proprietary tenure and the vendee is a co-sharer in the proprietary tenure in which the under-proprietary tenure is situated, the pre-emptor comes within first clause of Section 9 and has a preferential right. He and the vendee do not come in clause (1) as members of the village community. (*Dalal, A.J.C.*) MUHAMMAD ABDUL AZIZ *v.* BHAGWAN DAS. **65 I.C. 284 = 8 O.L.J. 560 = A.I.R. 1922 Oudh 101.**

—S. 9—Unrecorded co-sharers.

The right of pre-emption is given to co-sharers even when their names are not recorded in revenue records. A.I.R. 1926 Oudh 592, Foll. (*Stuart, C.J. and Raza, J.*) SRI NATH *v.* BHOWANI PRASOD. **109 I.C. 187 = 3 Luck 430 = 5 O.W.N. 130 = A.I.R. 1928 Oudh 486.**

—S. 9—Vendee from co-sharer.

Vendee from co-sharer is a co-sharer and takes property with the rights and liabilities of the vendor. The vendee or the last vendee in a chain of successive vendees of a property which bears the burden of pre-emption is as liable to deliver the property to a legitimate pre-emptor as is the first vendee. The general principle is that the assignee of the property takes it with all the rights and obligations or liabilities of the assignor. (*Simpson and Wazir Hasan A.J.Cs.*) MIRZA SADIQ HUSAIN *v.* MD. KARIM. **70 I.C. 53 = 25 O.C. 319 = 9 O.L.J. 456 = A.I.R. 1922 Oudh 289.**

OUDH LAWS ACT (1876), S. 10—Omission of notice.

—S. 9—Vendee from pre-empting class.

Vendee and plaintiff having equal rights—Plaintiff cannot pre-empt. (*Dalal, A.J.C.*) KANHAYA BAKSH SINGH *v.* SHEO NATH. **87 I.C. 956 = A.I.R. 1925 Oudh 665.**

—S. 10—Auction-purchaser.

As an auction-purchaser has a right to claim on confirmation of auction-sale that the property vested in him from the date of the auction, he is entitled to a notice under S. 10 in respect of any sale which takes place before the date of confirmation but after the date of auction and if such notice is not given to him he is entitled to pre-empt the sale. (*Ashworth and Raza, JJ.*) ABDUL RAHMAN *v.* FATEH NARAIN DAS. **91 I.C. 1047 = 6 O.W.N. 1248 = 1 Luck 80 = 13 O.L.J. 195 = A.I.R. 1926 Oudh 189.**

—S. 10—Avoiding of pre-emption.

It is not forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale which may eventually have the same effect as a sale : A. I. R. 1927 Oudh 40 ; 16 O. C. 9 and 18 O. C. 109, Foll. (*Stuart, C. J. and Raza. J.*) AJODHYA *v.* SHEOSHANKAR. **100 I.C. 193 = 2 Luck. 416 = 4 O. W. N. 137 = A. I. R. 1928 Oudh 25.**

—S. 10—Changes pending suit.

A vendee, who at the date of the sale was not a co-sharer, cannot defeat the suit brought by a pre-emptor by acquiring the possession of a co-sharer during the pendency of the suit, provided he was not acquired such a position from a person who was entitled to a notice under S. 10 and had not received it and whose right of pre-emption was not extinguished by any rule of law on the date of the acquisition by the vendees. (*Wazir Hasan, Ag. C. J., Misra and Pullan, JJ.*) GAYA PRASAD *v.* S. FAIYAZ HUSSAIN. **5 Luck. 12 = A.I.R. 1930 Oudh 274 (F.B.).**

—S. 10—Joint Hindu Family.

(*Dalal, Offg. J. C., Dissenting*). When a foreclosure decree is to be passed against the members of a Hindu joint family and the joint family owns property other than that foreclosed, notice need not be served individually on all the members of the joint family. (*Daniels, J.C., Dalal, Offg. J. C. and Ashworth, A. J. C.*) GAJADHAR *v.* LAL BEHARI, **88 I. C. 879 = 12 O. L. J. 202 = 2 O. W. N. 264 = 28 O. C. 139 = A.I.R. 1925 Oudh 352. (F.B.)**

—S. 10—Legitimate pre-emptor.

Per *Wazir Hasan, Ag. C. J.*—A pre-emptor who shows that the person from whom the title to the property, which carries with it the right of pre-emption has devolved on him was not given the notice required by S. 10, then such person must be held to be a legitimate pre-emptor and is entitled to acquire the subject-matter of the same. (*Wazir Hasan, Ag. C. J., Misra and Pullan, JJ.*). GAYA PRASAD *v.* S. FAIYAZ HUSSAIN. **5 Luck. 12 = A. I. R. 1930 Oudh 274 (F.B.)**

—S. 10—Omission of notice.

Where a decree for foreclosure in favour of a mortgagee is made final and the mortgage is foreclosed within S. 10 no notice being given by the decree-holder under S. 10 to any of the pre-emptors and a pre-emptor institutes a suit for the declaration of his right of pre-emption and obtains a decree, the interests of the decree-holder under the foreclosure decree are transferred by operation of law to the pre-emptor who by his action places himself in the exact position of the foreclosure decree-holder and is therefore entitled to execute that decree under O. 21.

OUDH LAWS ACT (1876), S. 10—Right to notice.

R. 16, C.P.Code. The action of the foreclosure decree-holder in withdrawing his rights as decree-holder and in certifying to the Court that his decree is satisfied by the execution of a fresh mortgage by the judgment-debtor can have no effect as against the pre emptor: 19 O.C. 183, Rel. on. (*Stuart, C. J. and Raza, J.*) DURGA PRASAD SINGH *v.* BISHUNATH BAKSH SINGH.

104 I.C. 831=4 O.W.N. 810= A.I.R. 1927 Oudh 358.

—S. 10—Right to notice,

———*Determines right to acquire property.*

Per *Wazir Hasan, Ag. C. J.*—Only such persons are entitled to acquire or retain the property, which is the subject-matter for a claim for pre-emption, who are entitled to the proper notice prescribed by S. 10 on the date of the proposal to sell and must have received such a notice. Such persons, however, include their representatives-in-interest. (*Wazir Hasan, Ag. C. J. Misra and Pullan, JJ.*) GAYA PRASAD *v.* S. FAIYAZ HUSSAIN. **5 Luck. 12=A.I.R. 1930 Oudh 274. (F.B.)**

———The meaning of the section is not that after the vendor has agreed to sell the property to some person he should issue a notice to those persons who have a right of pre-emption as against the vendee, but that a person who intends to sell property, which is subject to the right of pre-emption, shall issue a notice to all persons who have under the law of pre-emption a right to buy: 3 O.C. 330, Foll. (*Pullan, J.*) RAM SUKH DUBE *v.* RAMPAT TEWARI.

107 I.C. 879=5 O.W.N. 82= A.I.R. 1928 Oudh 218.

—S. 10—Sale resiled from.

R owned property in respect of which *J S* had a right of pre-emption. *R* entered into negotiations with *M* who made a tentative offer of Rs. 1,200 for it. *R* thereupon gave the notice required by S. 10 to *J S* that R was ready to sell the property for Rs. 1,200. *J S* made a tender of Rs. 1,200 by paying the said sum into Court. The tender was made within three months from the date of notice, but R and *M* did not continue the transaction. *M* resiled from the bargain and the property was not sold. *J S* came into Court claiming that under the provisions of S. 13 (b) he being the person entitled to a right of pre-emption could bring a suit to enforce such a right on the ground that he had made a tender under S. 11 and that that tender had been refused.

Held: that there had been no transfer by sale and the property had remained in possession of *R*, *J S* has, therefore, no right to the property: 13 O. C. 219, Foll. (*Stuart, C. J. and Raza, J.*) JUGGA SINGH *v.* MT. RANJITA. **105 I.C. 630= 4 O.W.N. 852=A.I.R. 1927 Oudh 438.**

—S. 11—Applicability.

Section 11 lays down the procedure where the sale-deed has not been executed yet. (*Simpson, A.J.C.*). SHEO DUTT BAHADUR SINGH *v.* BISHU NATH SINGH. **74 I.C. 206=9 O.L.J. 546=A.I.R. 1923 Oudh 91.**

—S. 13—Benami sale.

A suit to enforce a right of pre-emption was brought against persons who were found to be only benamidars. In the sale-deed they were mentioned as vendees from whom sale consideration was received. The names of vendees were also entered in the revenue registers,

Held: that the Court should only look as to who is the transferee according to proper construction of the deed and the suit for pre-emption would lie against such transferee: A.I.R. 1918 P. C. 140, Ref. (*Stuart, C. J. and Raza, J.*) MANSUR ALI *v.* SULTAN. **106 I.C. 539=4 O.W.N. 952= A.I.R. 1927 Oudh 509.**

OUDH LAWS ACT (1876), S. 13—Good faith. —S. 13—Deposit.

The procedure controlling the deposit of purchase money in a suit for pre-emption is stated in Ss. 14 and 15 of the Oudh Laws Act, 1876, and not in the rules of the Code of Civil Procedure. The expression "purchase money" means the whole of the purchase money as specified in the decree: A. I. R) 1924 Oudh 104, Foll. (*Wazir Hasan and Raza, JJ.* SHEO RAM *v.* TULA. **93 I. C. 1023= 13 O. L. J. 109=3 O.W.N. 274= 1 Luck. 158=A. I. R. 1927 Oudh 69.**

—S. 13—Fictitious price.

———*Duty of Court—Market Value.*

Where the Court arrives at a finding that the price fixed in the deed has not been fixed in good faith it is its duty to determine what is the fair market value of the property sold. No doubt in many cases the price actually paid is a very good indication for determining the fair market value of the property sold, and that it is an element which the Courts must consider in determining the market value but the Court must not treat the money actually paid as conclusive evidence of the market value. The market value, however, so determined should not exceed the sale price mentioned in the deed: 4 O. C. 158; A. I. R. 1926 Oudh 68 and 101 P. R. 1887, Rel. on. (*Misra and Raza, JJ.*) ZAHIR-UD-DIN *v.* ALI HUSAIN. **118 I.C. 85=6 O.W.N. 264= 4 Luck. 643=A. I. R. 1929 Oudh 244.**

———*Proof of.*

A Court in a pre-emption suit can decide on facts whether the property was sold for a fancy or a fictitious price, and can further determine its market value if it holds that the sale price was fixed in bad faith. But in the absence of actual evidence to show that the price was so fixed, no legal presumption to that effect can arise simply because it is found that the price paid by the vendee, as well as even that offered by the pre-emptor are, in view of the recorded income of the property, such as no reasonable man actuated by business principles would offer: 3 O.L.J. 543, Foll. (*Hasan and Raza, JJ.*) ASAF UDDAULA KHAN *v.* ABDUL GHAFFAR. **104 I.C. 664= 4 O. W. N. 795=A. I. R. 1927 Oudh 361.**

———*Duty of Court.*

When the plaintiff in a suit under Ch. 2 of the Act alleges that the price stated in the sale deed is fictitious and the allegation is denied, the Court under S. 13 of the Act has not to determine what the price paid for the property actually is, but whether the price stated in the deed is fictitious as alleged, and if so what the fair market value of the property is. (4 O.C. 158, Foll.; 10 O. C. 88, Discussed) (*Dalal, J, C.*) HAR PERSHAD *v.* SHEOSHANKAR. **90 I. C. 679= A. I. R. 1926 Oudh 68.**

—S. 13—Good faith.

The mere fact that an excessive or a fancy price is paid for the property or that the vendee fails to make proper inquiries about the property does not establish that the price was not fixed in good faith. (*Hasan and Raza, JJ.*) ASAFUDDAULA KHAN *v.* ABDUL GHAFFAR. **104 I.C. 664=4 O.W.N. 795= A.I.R. 1927 Oudh 361.**

———The words "in good faith" under S. 13 mean "honestly" and the word "honestly" applied to the fixing of the price of the property sold which is subject to pre-emption must import that the price fixed was meant to be actually paid and was not to be false or fictitious one in order to make out the value to be higher than the reality and to defeat pre-emption. (*Hasan and Raza, JJ.*) ASAFUD DAULA KHAN *v.*

OUDH LAWS ACT (1876), S. 13—Joint Hindu family.

ABDUL GHAFFAR. **104 I.C. 664=4 O.W.N. 795= A.I.R. 1927 Oudh 361.**

—S. 13—Joint Hindu family.

Son, manager of family—Father's personal right of pre-emption is not lost by son's refusal. 1 O.C. 254 and 5 O.C. 395, Ref. (*Wazir Hasan, Ag. C. J. and Misra, J.*) RAM NARAIN *v.* SHEO DARSHAN.

117 I.C. 477=6 O.W.N. 121=4 Luck. 524= 7 O.W.N. 226=A.I.R. 1929 Oudh 158.

—S. 14—Failure to deposit.

———*Right lost.*

Where a pre-emption decree directs payment of the purchase money within a certain time and the plaintiff makes default in making such payment the decree becomes void, and the right of pre-emption is lost and an appeal by pre-emptor filed after such default contesting the amount directed to be deposited is incompetent. (*Dalal, J. C.*) IMAM DIN KHAN *v.* ABDUL SATTAR KHAN. **74 I.C. 62=11 O.L.J. 74. A. I. R. 1924 Oudh 102.**

—S. 15—'Payment into Court'.

In accordance with a decree in a pre-emption suit, the money was tendered in court within the time fixed by the decree; the form of application prescribed therefor by the Oudh Civil Court Rules framed under Ss. 122 and 127 of the C. P. Code was duly filled up and received by the Munsif. The party entitled to the money under the decree applied to the court for permission to withdraw the amount; the court, after being satisfied that the property had been handed over to the plaintiff, directed payment out, without resorting to the cumbersome process, of the money being first placed into the treasury and then withdrawn therefrom under order of court by the decree-holder. The money, under such circumstances, was held to have been validly "paid into court" within the meaning of S. 15 of the Act. 5 O.C. 116; 8 O. C. 57; 14 O.C. 85; 23 O.C. 254; 26 O.C. 345; 1 Luck. 158, distinguished. (*Hasan and Misra, JJ.*) LAKHPAT SINGH *v.* SAT NARAIN SINGH.

5 Luck. 116=7 O.W.N. 655.

—S. 15—Payment out of Court.

———*Estoppel.*

Although it is true that the Court has no jurisdiction to extend the time for payment of purchase-money of a pre-emption decree and that such money should be paid in Court to render the payment valid, yet where the vendee by inducing the plaintiffs to believe that he would part with the property on receipt of money even after due date, has obtained money from the plaintiffs, he is estopped from contesting the plaintiff's right to execute the decree. (*Dalal, A. J. C.*) SHAMSHER SINGH *v.* MT. RAM KALI.

74 I.C. 784=A.I.R. 1924 Oudh 153.

—S. 15—Sufficient compliance.

The respondent obtained a pre-emption decree subject to payment of Rs. 80 which he duly deposited, but subsequently attached and withdrew on account of the amount due to him for costs a sum of Rs. 22. The appellate Court increased the amount payable for the property to Rs. 106-6-0. He accordingly paid the balance of Rs. 26-6-0 and obtained possession of the property. Under the decree both parties were to pay their own costs in the event of the plaintiff complying with the decree. On the matter being brought to notice the plaintiff paid in the amount of Rs. 22 which he had withdrawn but not within the one month allowed by the decree.

Held: that there was a sufficient compliance with the decree. 34 A. 596, Foll. It made no difference that in Oudh the right of pre-emption is a statutory right

OUDH LOCAL RATES ACT (1878), S. 3—Mortgagee in possession.

and payment is made in accordance with S. 15 of the Oudh Laws Act. (*Daniels, A.J.C.*) BINDA PRASAD *v.* BANARSI DAS. **77 I.C. 116=10 O.L.J. 206= A.I.R. 1923 Oudh 271.**

—S. 16—Circumvention of Law.

———*Nature of the transaction,*

It is not forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale though it may evidently have the same effect as a sale. A person, in order to defeat the right of pre-emption, may decide not to have a sale-deed but to have a mortgage-deed with onerous conditions making its redemption difficult or might have a lease executed in his favour making himself liable to pay a small sum, however insignificant, as rent. Under the law of pre-emption such devices are permissible because they fall short of the transaction of sale which alone can give rise to a right of pre-emption, but it does not mean that a disguise cannot be exposed. Where the parties had really entered into a sale transaction but disguised it under the mask or cloak of a different transaction such as *hiba-bil-ewaz*, the Court must look to the real nature of the transaction for the purpose of determining whether it could be subject to the right of pre-emption or not: 18 O.C. 109, Rel. on; A.I.R. 1927 Oudh 40; A.I.R. 1926 Oudh 186; A.I.R. 1928 Oudh 25; A.I.R. 1927 Oudh 161; A.I.R. 1928 Oudh 103; and A.I.R. 1927 Oudh 576; Dist. (*Stuart, C.J. and Srivastava, J.*) MOHAMMAD ISHAQ *v.* MT. FAHIMUN NISSA, **113 I.C. 263=5 O.W.N. 825= 4 Luck. 68=A.I.R. 1928 Oudh 472.**

—S. 20—Ancestral land.

Land which comes into the possession of a person as a result of litigation, on the ground of his adverse possession against the Taluqdar to whom it originally belonged is not the ancestral property of that person. (*Dalal, J. C. and Neave, A. J. C.*) SIRAJ AHMAD *v.* IBNUL HASAN. **85 I.C. 816=A.I.R. 1925 Oudh 671.**

—S. 25—Usufructuary mortgage.

Out of the eight annas share in a village owned by *A* four annas were transferred by way of a usufructuary mortgage to the plaintiff. Within his proprietary share of eight annas, *A* held certain *sir* lands and a proportionate share of the *sir* lands was transferred to plaintiff when the mortgage of four annas was made in his favour. Plaintiff claimed for a share of profits under Cl. 15 of S. 108, *A* had all along been in possession of his *sir* lands on the ground that the relationship of co-sharers existed between him and the plaintiff,

Held: that once the usufructuary mortgage in favour of the plaintiff was created in respect of the four annas share; A became a tenant with a right of occupancy in the proportionate area of the *sir* lands by virtue of S. 25, Oudh Laws Act, 1876, if the mortgage was made prior to the 1st January 1902, or an expro-prietary tenant within the meaning of S. 7-A, Oudh Rent Act, 1886, if the mortgage was effected after the 1st January 1902, in either case he was a tenant and was not liable to account to the plaintiff on the footing of a co-sharer, (*Wazir Hasan and Pullan, JJ.*) PAHLAD SINGH *v.* SURAJ BAKHSH SINGH.

109 I.C. 304=5 O.W.N. 155=3 Luck. 436= 10 L.R.A. Rev. 23=A.I.R. 1928 Oudh. 223.

OUDH LOCAL RATES ACT (IV OF 1878).

—S. 3—Mortgagee in possession.

Mortgagee in possession, is a "Landholder" within the meaning of the Act. (*Sir John Edge*). MIRZA ABID HUSAIN KHAN *v.* MT. KANIZ FATMA.

80 I.C. 1019=29 C.W.N. 214=22 A.L.J. 284=

OUDH RENT ACT (1868), S. 125—Sale under.

34 M.L.T. 78=46 All. 269=19 M.L.W. 703=51 I.A. 157=11 O.L.J. 427=27 O.C. 72=1924 M.W.N. 657=5 L.R.P.C. 212=A.I.R. 1924 P.C. 102. (P.C.)

OUDH RENT ACT (XIX OF 1868).—Since repealed by XXII of 1886.)

—S. 125—Sale under.

The consequences which shall ensue from sale taking place for the satisfaction of a decree for an arrear of rent under the provisions of S. 125 of the Oudh Rent Act are widely different from the consequences which are to ensue from a sale of land for an arrear of land revenue and which are defined by S. 133 of the Oudh Land Revenue Act, and the fact that the last clause of S. 125 invests the Deputy Commissioner with the power of selling the land in satisfaction of a decree for an arrear of rent as he might have exercised for the recovery of an arrear of revenue does not by any means lead to the conclusion that the consequences of the two sales shall also be the same. (*Stuart, C. J. and Wazir Hasan, J.*) KAMPTA SIROMAN PD. *v.* RAM SWARUP PANDEY.

101 I.C. 285=2 Luck. 475=4 O.W.N. 277=A.I.R. 1927 Oudh 202.

———It would obviously be opposed to all principles of justice and equity to hold that rights of persons not in any way connected with the judgment-debtors would be affected by sale held in execution of decree against those judgment-debtors.

The effect of a sale held under S. 125 of the Oudh Rent Act read with S. 133 of the Oudh Land Revenue Act would be only to destroy the rights of the under-proprietor against whom a decree has been passed and of those who held by virtue of a grant or contract previously made by those under-proprietors, but not the rights of other persons not in any way connected with the judgment-debtors. (*Gokaran Nath Misra and Raza, JJ.*) KAMTA SIROMAN *v.* MATA BADAL.

99 I.C. 391=3 O.W.N. Sup. 266=8 L.R.A. Rev. 37=A.I.R. 1927 Oudh 72.

OUDH RENT ACT, (XXII of 1886), (As amended by IV of 1921, I of 1923 and IV of 1925 etc.)

—Duty and liability of Lambardar.

If a lambardar is proved to have been negligent or if he is proved to have misconducted himself, it is open to a Court to decree to a co-sharer, who claims a share of profits under S. 108, Cl. (15), Oudh Rent Act, 1886, not only the share of profits actually collected, but the share of profits which has remained uncollected.

There are circumstances when, if the lambardar fails to fulfil this obligation, he can be made liable for the gross rental, but it will always remain a question of fact, whether his omission in failing to keep proper accounts affords proof of such misconduct or negligence as would justify a passing of a decree on the basis of demands rather than on recorded collections. (*Stuart, C. J., Wazir Hasan and Raza, JJ.*) CHITAR KET SINGH *v.* KANHAYA BAKHSH SINGH.

105 I.C. 285=4 O.W.N. 725=A.I.R. 1927 Oudh 337 (F.B.)

—S. 3—Grove-holder.

A grove-holder cannot be considered to be a tenant within S. 3, Cl. (10), because such a person neither pays rent to the landlord, nor is he liable to pay rent to him : 5 O.L.J. 639 and A.I.R. 1926 Oudh 38, Rel. on. (*Misra, J.*) JAGDISH BAHADUR SINGH *v.* RAGHO RAM. 94 I.C. 349=29 O.C. 271=13 O.L.J. 265=3 O.W.N. 392=A.I.R. 1926 Oudh. 458.

———A grove-holder is not a tenant within S. 3 (10) and, therefore, if he is ejected illegaly by the landlord a suit for possession by him lies in the civil Court and not in the revenue Court. 5 O. L. J. 639, Rel. on. (*Misra, J.*) SECY. OF STATE *v.* AURCHARAN DAS. 91 I.C. 927=1 Luck 33=13 O.L.J. 115=3 O.W.N. 45=A.I.R. 1926 Oudh. 98.

OUDH RENT ACT (1886), S. 3—'Sir' land.

———*Lambardar.*

A *lambardar* in some respect has larger powers than an ordinary manager or agent appointed by an instrument. He can act as a prudeni manager for the benefit of his co-sharers, so far as such act falls within the purview of the objects for which he is so appointed. He can, therefore, grant a lease for a long term, so long as he does not prejudice the interests of his co-shares thereby. (*Kanhaiya Lal, J.C. and Dalal, A.J.C.*) MUHAMMED MASNA ALAM *v.* MOHAMMAD MOHMUD. 66 I.C. 21=9 O.L.J. 66=24 O.C. 369=A.I.R. 1922 Oudh 40.

———*Mortgage by tenant-at-will.*

Even though a mortgage by a tenant-at-will is not binding on the landlord, it is open to him to recognise it as valid. Such a mortgage is not *ab initio* void. A mortgagee cannot go behind his mortgage and dispute the mortgagor's right to enforce redemption. (*Kanhaiya Lal, J.C.*) BHAIRON *v.* BALAT.

68 I.C. 558=9 O.L.J. 331=A.I.R. 1922 Oudh 287.

—S 3—Land.

Apart from special contracts or customs, 'land' as defined in the Oudh Rent Act includes ungathered produce of land, whether spontaneous or not and will include trees.

A Settlement Court decree conferring on the decree-holder's occupancy rights in trees does not entitle them to transfer the same. But they are entitled only to take away the wood. (*Kendall, A.J.C.*) MUHAMMAD HAYAT KHAN *v.* SURAJ BALI SINGH.

84 I.C. 1005=A.I.R. 1925 Oudh 315.

—S. 3—Right of fishing.

An exclusive right of fishing in a tank does not amount to a right in the land below the water and plaintiffs possessing such rights are not entitled to be considered as under-proprietors of that land. (*Pullan, J.*) SAT NARAIN *v.* DEPUTY COMMR., MANAGER, COURT OF WARDS. 6 O.W.N. 829=10 L.R.A. Rev. 351=A.I.R. 1929 Oudh 433.

—S. 3—'Sir land.'

The fact that trees are planted on *sir* land does not destroy the character of the land as *sir*. The auction-purchaser in a sale of *sir* land in execution of a decree against the proprietor acquires merely the right of a proprietor to rent from the ex-proprietary tenant and is not entitled to actual possession. The sale cannot wipe off the exproprietary rights which the law creates in favour of the owner of *sir* land. 39 All 173, Rel. on. (*Wazir Hasan, J.*) CHANDRA SEN SINGH *v.* BHAGWAN SINGH. 91 I.C. 938=29 O.C. 123=13 O.L.J. 726=3 O.W.N. 51=A.I.R. 1926 Oudh 177.

———*'Meaning of' in Oudh.*

The restricted meaning of the word *sir* in Act XXII of 1886 is a meaning based to some extent upon the meaning of the word in the Province of Agra, and is largely the creation of the English Revenue Authorities. The word *Sir* used by an Oudh man would not be confined to the meaning which it bears in Act XXII of 1886. Amongst the various classes of *sir* under-proprietors who never had the full and exclusive proprietary right of the whole village is the land frequently assigned to the junior branches of a family for their support, instead of breaking up the estate and giving them the ancestral shares to which they were entitled. Such appanages are known in Oudh by the name of *sir*. They also form one and

OUDH RENT ACT (1886), S. 3—Under-proprietary holding.

the chief class of Jewan Birt, which is a name also sometimes applied to this class of *Sir*. Whole villages assigned in this way were also called Bhayai villages. (*Sir John Edge.*) BIJAI RAJ KUNWAR *v.* JAI INDRA BAHADUR. **79 I.C. 250=44 All. 435=9 O.L.J. 385=31 M. L.T. 69=49 I.A. 262=36 C.L.J. 511=27 C.W.N. 221=25 O.C. 260=21 A.L.J. 125=A.I.R. 1922 P.C. 317=43 M.L.J. 682 (P. C.).**

—S. 3—Under-proprietary holding.

There can be an under-proprietary holding held rent-free. The words "for which he is liable to pay rent" in S. 3 (8) refer to a potential and not necessarily a present liability. 20 O.C. 171, Foll. 23 O.C. 30, Ref. (*Daniels, A.J.C.*) BIKRAOO *v.* ANANT BAHADUR SINGH. **63 I. C. 551=8 O. L. J. 311=A. I. R. 1921 Oudh 167.**

—S. 3—Under-proprietary right.

———*Adverse possession.*

Plaintiffs suing for under-proprietary or other possession of certain plots against the taluqdar can have no claim as to agricultural land. They can set adverse possession but such adverse possession is only that of a tenant and the mere fact that they were formerly village zemindars does not give them any title. (*Pullan, J.*) SAT NARAIN *v.* DEPUTY COMMR., MANAGER, COURT OF WARDS. **6 O. W. N. 828=10 L. R. A. Rev. 351=A.I.R. 1929 Oudh 433.**

———S. 3 (8) does not exhaustively define the right of an under-proprietor. If in any circumstance a proprietor is afforded a right of re-entry against a transferee of agricultural land in Oudh, such transferee will not be entitled to under-proprietary rights. Where however there is no possibility for the exercise by the lessor of a right of re-entry, the possible bar for the defendant's under-proprietary title having been removed, the rights conferred by the lease are perfected into under-proprietary rights. (*Kanhaiya Lal, J. C. and Dalal, A. J. C.*) SHAIKH RUTAB ALI *v.* MOHAMMAD ZAMAN BEG. **66 I. C. 106=9 O. L. J. 101=A.I.R. 1923 Oudh 41.**

———*Words and Phrases.*

A document was christened with the name of a "perpetual lease". After reciting the area of the lands, which were the subject-matter of the deed, the document prescribed a *jama* of Rs. 102-2-0, annually payable by the lessor, and then proceeded as follows :—"I do hereby agree and reduce to writing that the said "lessee" having his possession over it shall annually pay the pay of the Patwari and Chaukidar *i.e.*, the entire amount of Rs. 102-2 shall be paid to the Government, and he shall remain in possession and enjoyment of the same generation after generation (*naslan bad naslan*), *batnan bad batnan*), and shall exercise all sorts of proprietary powers." It was found that the donee and his sons used to pay rent to the donor and her transferee. *Held*: the name "perpetual lease" is not inconsistent with a grant of heritable and transferable right in the property which is the subject-matter of the deed in question. The defendants are not proprietors of the lands in suit, but they are under-proprietors *i.e.*, they possess heritable and transferable interests in those lands. (*Dalal and Wazir Hassan, A. J. Cs.*) KARIM DAD KHAN *v.* MT. BIBI GHAPURAN. **66 I. C. 110=9 O.L.J. 104=A.I.R. 1922 Oudh 42.**

———If a perpetual lease confers both heritable and transferable rights upon the lessee, the lessee is an under-proprietor within S. 3 (8). There is no provision in the Act for enhancing the rent of under-proprietor. (*Harrison, J. M.*) MUHAMMAD JAMAN BEG *v.* SHEIKH ILAHI BUX. **60 I.C. 618=1 L. R. A. 69 Rev.=2 U. P. L. R. (B.R.) 111.**

—S. 4—Void Agreement.

S. 4 does not enable the landlord to claim rent under a void agreement. It merely restricts the landlord from ejecting the tenant or enhancing his rent except in accordance with the provisions of the Act. (*Kendall, A. J. C.*) GUR DIN *v.* SIRAJUNNISSA. **80 I.C. 513=11 O.L.J. 445=A. I. R. 1924 Oudh 432.**

—S. 5—Conditions under.

The wording of S. 5, Oudh Rent Act, does not lay down anywhere any condition to the effect that the proprietary right must have been lost within the specified period of 30 years mentioned in the section, *i.e.*, between the 13th February 1826 and 13th February 1856. The only condition which is insisted on in this section is that a claimant, in order to establish his occupancy rights, must show that he or his ancestors were in the possession of the village in which the lands in suit are situate as proprietors within the said period. It may be that their proprietary rights may have been lost within this very period. As long as the claimant can establish that he had lost his proprietary rights before 24th August 1866, and had become a tenant of those lands before that date, he satisfies the conditions laid down in S. 5: 5 O. C. 176: 29 I.C. 401; and 8 O.L.J. 64; Rel. on; R.A. R. No. 43 and S. D. 7 of 1903, Dist. (*Misra, J.*) PAYAG SINGH *v.* MANOHAR LAL. **111 I.C. 465=3 Luck. 616=10 L.R.A. Rev. 78=5 O.W.N. 622=A.I.R. 1928 Oudh 369.**

—S. 5—Division among heirs.

———*Transfer.*

A 'transfer' in law must be deemed to imply a transfer by a person entitled to that property in favour of a person having no title otherwise.

Where a holding is claimed by different heirs of a deceased occupancy tenant or where the occupancy tenure forms part of the property of a joint family or of co-tenants and a division takes place among such persons, it cannot be held that the transaction amounts to a transfer from one having a right in favour of one having no right at all : 33 All. 143, Foll.; 23 All. 383 (P.C.), Dist. (*Misra, J.*) RAMMAN SINGH *v.* DITTA SINGH. **114 I.C. 803=10 L.R.A. Rev. 190=4 Luck. 243=6 O.W.N. 1315=A.I.R. 1929 Oudh 334.**

—S. 5—Jurisdiction of Civil Court.

Where a decree of a Settlement Court in Oudh has from the necessity of the case, been unable to decide whether a man is or is not an under-proprietor, or where there is no decree of a Settlement Court deciding the point, then undoubtedly the question, as to whether a man has or has not under-proprietary rights, must be decided by Civil Court upon other evidence. But where the decree of the Settlement Court can leave no doubt as to the fact that the parties are occupancy tenants and not under-proprietors, it is not open to the Court to go behind it. (*Stuart, C.J., and Pullan, J.*) MAHABIRBUX SINGH *v.* SITLA BUX SINGH. **107 I.C. 871=3 Luck 167=10 L.R.A. Rev. 15=4 O.W.N. 1255=A.I.R. 1928 Oudh 152.**

—S. 5—Mortgage—Validity of.

The representative of an occupancy tenant who has mortgaged his occupancy holding cannot challenge the mortgage on the ground that it is void in law if the tenancy is one covered by the proviso to S. 5 : 15 O.C. 67, Foll.; A.I.R. 1925 Oudh 401 and A.I.R. 1925 Oudh 457, Diss. from. (*Pullan, J.*) ABDUL GAFUR KHAN *v.* KARAMAT KHAN. **106 I.C. 126=**

OUDH RENT ACT (1886), S. 5—Occupancy right.
4 O.W.N. 1033=9 L.R.A. Rev. 344=
A.I.R. 1928 Oudh 41.

—S. 5—Occupancy right.

A land acquired under a deed granting heritable and non-transferable tenancy might be described as occupancy, although it is not occupancy land within the meaning of S. 5. A sale of occupancy land in favour of the landlord is perfectly legal. (*Daniels, A.J.C.*) ASHIQ ALI *v.* GHULAM SARWAR.
89 I.C. 412=A.I.R. 1925 Oudh 742.

—S. 5—Rights under.

Occupancy rights conferred under S. 5 are different from those conferred by decree of Settlement Court—Mortgage of latter rights is voidable not by transferor or his assignee but by landlord—Mortgage of former is void *ab initio*. 14 O.C. 144 and 15 O.C. 67, Foll.; 6 O.C. 331, Ref.; A.I.R. 1928 Oudh 344, Rel. on. (*Mirza, J.*) RAM HARAKH *v*, CHAIL BEHARI.
111 I.C. 194=
A.I.R. 1928 Oudh 500.

—S. 5—Scope of.

S. 5 of the Oudh Rent Act does not intend to limit occupancy rights to persons who had lost proprietorship before the annexation. (*Ferrard, S. M. and Hopkins, J.M.*) LAL BAHADUR SINGH *v.* TRIBHAVAN BAHADUR SINGH. **61 I.C. 158=8 O.L.J. (B.R.) 64.**

—S. 5—Transfer of non-transferable rights.

Plaintiff claiming non-transferable holding under gift from Defendant in possession—Defendant is not estopped from pleading non transferability. 6 O.C. 331, Foll. (*Daniels, J. C.*) PRATAB BALI *v.* MAHANT SURESH DUTTA. **87 I.C. 1030=12 O.L.J. 329=**
2 O.W.N. 325=29 O.C. 77=
A.I.R. 1925 Oudh 457.

—S. 7-A—Effect of Court sale.

A Court sale cannot wipe off the ex-proprietary rights which the law creates in favour of the owner of the land and the auction purchaser is not entitled to actual possession. Such ex-proprietary rights are not confined to the land only but extend to trees on the land as well : A.I.R. 1926 Oudh 177, Foll. (*Wazir Hasan, J.*) NAND RAM *v.* CHHEDILAL.
105 I.C. 466=4 O.W.N. 955=
A.I.R. 1927 Oudh 512.

—S. 7-A—Effect of mortgage.
———*Tenant.*

Out of the eight annas share in a village owned by *A* four annas were transferred by way of a usufructuary mortgage to the plaintiff. Within his proprietary share of eight annas, *A* held certain *sir* lands and a proportionate share of the *sir* lands was transferred to the plaintiff when the mortgage of four annas was made in his favour. Plaintiff claimed for a share of profits under Cl. 15 of S. 108. *A* had all along been in possession of his *sir* lands on the ground that the relationship of co-sharers existed between him and the plaintiff.

Held : that once the usufructuary mortgage in favour of the plaintiff was created in respect of the four annas share, *A* became a tenant with a right of occupancy in the proportionate area of the *sir* lands by virtue of S. 25, Oudh Laws Act, 1876, if the mortgage was made prior to the 1st January 1902, or an exproprietary tenant within the meaning of S. 7-A, Oudh Rent Act, 1886, if the mortgage was effected after the 1st January 1902, in either case he was a tenant and was not liable to account to the plaintiff on the footing of a co-sharer. (*Wazir Hasan and Pullan, JJ.*) PAHLAD SINGH *v.* SURAJ BAKHSH SINGH. **109 I.C. 304=3 Luck 436=**
10 L.R.A. Rev. 23=5 O.W.N. 155=
A.I.R. 1928 Oudh 223.

OUDH RENT ACT (1886), S. 20—Burden of proof. —S. 7-A—Provisions imperative.

The provision of law in the section is imperative and must be given effect to. The policy of the law has been the same prior and subsequent to the amendment. 10 O. C. 243 and 39 All. 173 (P. C.) Ref. (*Wazir Hasan and Mirza, JJ.*) HASAN BAGAR *v.* SHEO NARAIN SINGH. **91 I.C. 917=1 Luck. 7=**
13 O. L. J. 178=3 O. W. N. 25=
A. I. R. 1926 Oudh 81.

—S. 7-A—Rent of Sir Land.

A person holding *Sir* land of which he is an exproprietory tenant within the meaning of S. 7-A is liable to account for the rent of the same only at the rent fixed by law and that is "four annas in the rupee less than the fair and equitable rate payable by statutory tenants for land of the same class or classes of soil." (*Wazir Hasan, Ag. C. J. and Pullan J.,*) CHANDRICA SINGH *v.* INDER KUNWAR RANI.
117 I. C. 449=10 L. R. A. Rev. 194=
A. I. R. 1929 Oudh 384.

—S. 8—Power of Thekadar.

Per *Srivastava, J.*—A thekenama containing a distinct provision preventing the thekadar from granting pattas to the tenants on his own authority should be strictly construed like a power-of-attorney. He is not an authorised agent and pattas granted by him are invalid. *Cooper* v. *Martin*, (1867) 3 Ch. 47 and *Lawrnesson* v. *Butler*, 1 S. & L. 13, Foll. (*Stuart, C. J. and Raza, J. on reference by Srivastava. J.*) KRISHNAKUMARI DEVI *v.* TRIBHUVAN DAT.
114 I.C. 305=5 O.W.N. 905=
10 L.R.A. Rev. 216=
A.I.R. 1929 Oudh. 12.

—S. 17—Old Act.
———*Effect of Amending Act of* 1923.

The recovery of any sum in addition to rent could never be enforced through a Court before the passing of the amended Oudh Rent Act of 1923 just as much as it could not be subsequently. All that the Act laid down was that if any nazrana was recovered, the sum recovered would be considered as a payment illegally enforced and could be obtained back. After the passing of the amendment even if the nazrana is recovered amicably it will be presumed that the payment was illegally enforced and the landlord would be liable to the penalty provided by S. 17. (*Dalal, J. C.*) MANOHARLAL, VAKIL *v.* RAM RATAN PHATAK.
88 I.C. 538=2 O.W.N. 439=12 O.L.J. 561=
A.I.R. 1925 Oudh 434.

—S. 18—Diluvion.

The lessee is entitled to claim abatement of rent on the ground that the area of his holding has diminished. (*Hasan and Misra, JJ.*) ABDUL RAHMAN *v.* JAGAT JIT SINGH. **97 I.C. 917=**
3 O.W.N. Sup. 153=A.I.R. 1926 Oudh 553.

—S. 18—Failure to Deliver.

Where a lessor fails to deliver possession of a portion of the property demised to the lessee, the lessee can claim a deduction on the ground that the area of his holding has been diminished even in the suit for arrears of rent brought against him. (*Misra, J.*) AJUDHIA PRASAD *v.* SHEIKH BHULAI.
96 I.C. 341=13 O.L.J. 599=
A.I.R. 1926 Oudh 525.

—S. 20—Burden of proof.
———*Evidence Act, S.* 103.

It is for the rival tenant in order to make out a valid surrender to establish that the previous tenant has given over possession at the latest by the commencement of the year, when the patta in his favour took effect. (*Srivastava, J.*) MINDAI *v.* SAJID ALI.

OUDH RENT ACT (1886), S. 20—Relinquishment —What is.

6 O.W.N. 1094=11 L.R.A. Rev. 24= A.I.R. 1930 Oudh 69.

—S. 20—Relinquishment—What is.

———*Compromise.*

A compromise of suit merely recognizing a pre-existing proprietary title does not amount to a relinquishment of ex-proprietary rights by the tenant as the Oudh Rent Act prescribes a special procedure for the relinquishment of a tenancy. (*Wazir Hasan, J.*) NAND RAM *v.* CHHEDI LAL. **105 I.C. 466= 4 O.W.N. 955=A.I.R. 1927 Oudh 512.**

—S. 20—Scope of.

———*Relinquishment.*

The provisions of S. 20, Oudh Rent Act, in respect of the relinquishment of land by a tenant are not exhaustive and it is possible for a tenant to make a valid relinquishment under a private arrangement between himself and the landlord. But in order that any such relinquishment by means of an amicable arrangement between the tenant and landlord may be valid it is necessary that the tenant must make actual surrender of possession in favour of the landlord. (*Srivastava, J.*) MINDAI *v.* SAJID ALI.

6 O.W.N. 1094=11 L.R.A. Rev. 24= A.I.R. 1930 Oudh 69.

—S. 21—Fulfilment of conditions.

Certain land was originally held by *K* under a lease from *C*. Later on *C* treated the holding as abandoned and gave lease thereof to *G*. *G* brought a suit against *K* for recovery of possession. *C* had issued notice prescribed by S. 21 and entered upon the holding. *K* instituted a suit impugning the proceedings and seeking relief uuder S. 108 (10), but his suit was dismissed. *K's* plaint was construed as containing an admission of *C* having entered the holding,

Held : that all the necessary conditions prescribed by S. 21 had been satisfied and *C* became entitled to let the holding to another person and lease executed in favour of *G* was valid. (*Raza and Srivastava, JJ.*) GOPAL DATT *v.* RAMESHWAR. **7 O.W.N. 763= A.I.R. 1930 Oudh 442.**

—S. 21—Notice.

Oudh Rent Act does not contemplate any proceedings for contesting a notice issued under S. 21 other than a suit under S. 108 (10). (*Raza and Srivastava, JJ.*) GOPAL DATT *v.* RAMESHWAR.

7 O.W.N. 763=A.I.R. 1930 Oudh 422.

—S. 21—Possession.

Section 21 should be read with S. 131. It is not necessary for the landlord in order to comply with the provisions of Ss. 21 and 131 to obtain actual physical possession of the land. (*Raza and Srivastava, JJ.*) GOPAL DATT *v.* RAMESHWAR.

7 O.W.N. 763=A.I.R. 1930 Oudh 422.

—Ss. 32-A and B.—Applicability.

Plaintiff brought a suit for arrears of rent and alleged that the terms of the tenancy were contained in a *kabuliyat*. He also alleged that he had received payments of rent from the defendant. The defendant set up a *quasi*-proprietary title. He did not admit that he was plaintiff's tenant at all. He denied the *kabuliyat* and he denied the payments of rent. The *kabuliyat* was found to be not genuine, and no rent was found to have been paid,

Held, that the plaintiff can set up no case under S. 32-A, because no rent has been agreed upon between him and his tenant, nor can he proceed under S. 32-B because he has failed to prove that the defendant is a tenant at all, and that he cannot succeed under S. 127 because he has failed to show that the defendant is a person not entitled to possession.

OUDH RENT ACT (1886), S. 48—Suit for possession.

(*Simpson, A. J. C.*) TAWAKKUL KHAN *v.* MD. MEHDI ALI KHAN. **90 I.C. 375= A.I.R. 1926 Oudh 49.**

—S. 32-B—Appeal.

When a plaintiff brings a suit for arrears of rent and joins a relief with regard to the determination of rent, the suit nevertheless remains a suit for arrears of rent, brought under S. 108, clause (2). Appeal lies to the District Judge. The relief with regard to determination of rent is merely ancillary to his getting a decree and the inclusion of that relief cannot deprive the Civil Court of its jurisdiction to entertain the appeal. (*Misra, A.J.C.*) KALKA *v.* RAM SUCHIT. **89 I.C. 511=12 O.L.J. 362=2 O.W.N. 499= A.I.R. 1926 Oudh 499.**

—S. 36—Mortgage.

———*Validity.*

A mortgage of a simple tenancy holding is unlawful and does not confer any right on the mortgagee to hold possession of the holding as such. On refund of the amount advanced the mortgagor in such a case is entitled to recover possession of the holding, but he is not entitled to mesne profits : A.I.R. 1926 Oudh 270, Rel. on. (*Raza, J.*) QUTBUDDIN *v.* ABDULLAH KHAN. **121 I.C, 275=A.I.R.1930 Oudh. 206.**

—S. 37—Powers of Thekadar.

A thekadar is not a landowner within the meaning of the section and a leasegranted by him to a tenant does not give a statutory right to the tenant. (1893) A.W.N. 8 and A. I. R. 1928 Oudh 240, Diss. from : No. 52 of Rent Rulings published by U.C. Banerji, Ref. (*Stuart, C.J. and Raza, J. on reference by Srivastava, J.*) KRISHNAKUMARI DEVI *v.* TRIBHUWAN DAT. **114 I.C. 305=5 O.W.N. 905= 10 L.R.A. Rev. 216= A.I.R. 1929 Oudh 12.**

—S. 48—Collaterals.

Collateral heirs of the husband of the widow cannot be considered to be the heirs within S. 48 (2) if they did not on the date of the death of the deceased widow share in the cultivation of the holding. *Misra, J.*) JODHA *v.* DARBARI LAL. **104 I.C. 193= 2 Luck 612=1 L.C. 285= A.I.R. 1927 Oudh 339.**

—S. 48—Interpretation.

———'*Payable*'.

The word 'payable' in S. 48 as amended by Act IV of 1921 means payable under an agreement which was valid, when entered into according to the law in force at the time. (*Kendall, A.J.C.*) GUR DIN *v.* SIRJUNNISSA. **80 I.C. 513=11 O.L.J. 445=A.I.R. 1924 Oudh 432.**

———'*Heir*'.

The expression "the heir of a tenant" does not exclude the heir of the heir of a tenant. The word 'heir' denotes the sense of representation of the first tenant through his successors in inheritance for the whole term of the tenancy. (*Wazir Hasan, A.J.C.*) BABU RAM NARESH SINGH *v.* DALPAT SINGH. **77 I.C. 120=10 O.L.J. 357=5 L.R. Oudh 15= A.I.R. 1924 Oudh 142.**

—S. 48—Lease within five years.

Hindu female dying leaving no heirs through husband—Her nearest relative through father sharing in cultivating her holding—After her death Court of Wards leasing out holding before expiry of five years—Such lease was inoperative. (*Misra and Nanavutty, JJ.*) SITAL *v.* HARPAL. **111 I.C. 521= A.I.R. 1929 Oudh 11.**

—S. 48—Suit for possession.

———*Proof of title.*

Where the plff. in a suit for possession of a cultiva-

OUDH RENT ACT (1886), S. 50—Break in tenancy.

tory holding alleges title based on inheritance and his right by inheritance is not proved, the suit will be dismissed though the deft,. be in possession without any right at all. (*Lindsay, J.C.*) KALI DIN *v.* SHEO SARAN. **60 I.C. 711=7 O.L.J. 690.**

—S. 50—Brear in tenancy.

A break in the holding of tenancy does not make an enhancement of rent legal when it was not shown that the landlord had made any improvement and the break was a trick to deprive the tenant of the protection of law : A.I.R. 1924 Oudh 432, Ref. (*Raza, J.*) MAHOMED YAKUB *v.* JAGANNATH. **110 I.C. 70= A.I.R. 1928 Oudh 405.**

—S. 52-A.—Thekadar.

Though S. 52-A has not been made expressly applicable to the case of a thekadar by reason of its not being mentioned in S. 3 (10) as one of the sections in which the expression "tenant" is to be held to include a thekadar, the omission does not establish that the intention of the legislature was to justify the ejectment of a thekadar without having recourse to law. A thekadar holding on after expiry of his term is entitled to a notice of ejectment as any other tenant included in S. 53 (1) : S. D. No. 33 of 1891 and 3 U. D. 149, Rel. on. (*Misra and Pullan, JJ.*) AMBIKA PRASAD *v.* BENI MADHO. **118 I.C. 841= 4 Luck. 649=7 O.W.N. 343=A.I.R. 1929 Oudh 529.**

—S. 54—Grove-holder.

The mere fact that a land is liable to resumption or assessment of rent on the ground that a grove had ceased to exist would not make the grove-holder a tenant liable to be ejected by notice. Such a notice must be deemed to be invalid and the ejectment illegal, and it would be open to the grove-holder to bring a suit for possession against the landlord in civil Court. The proper remedy for a landlord is to take resumption proceedings under Chap. (7-A). (*obiter*) 5 O.L.J. 639 and A.I.R. 1926 Oudh 458, Foll. (*Wazir Hasan, Ag. C.J., and Gokaran Nath Misra, J.*) SHEOSAGAR *v.* LACHHMAN. **114 I.C. 753=5 O.W.N. 1083= 10 L.R.A. Rev. 220=4 Luck 284= A.I.R. 1929 Oudh 60.**

—S. 60—Determination of tenancy.

Ejectment—Notice of ejectment not contested or upheld in unsuccessful proceedings—Tenancy determines only when tenant surrenders possession or proceedings are taken under S. 60. A. I. R. 1926 Oudh 555, Ref. (*Srivastava, J.*) THAKURAIN HARAJ KUNWAR *v.* SAMAD. **123 I.C. 49= 7 O. W. N. 330=A.I.R. 1930 Oudh 202.**

—S. 60—Grove-holder.

A person who is holding land for planting grove and paying rent for it, is necessarily a tenant but a person to whom land is granted for that purpose without any contract to pay rent is not a tenant within the meaning of the Oudh Rent Act. He is a grove-holder and is entitled to hold possession so long as the land retains the character of a grove and proceedings taken in ejectment against him in the revenue Court are without jurisdiction. But where persons are not holding the land as grove-holders but as tenants and are paying rent for the same as such and claim no rights as grove-holders in the ejectment suit then the proceedings taken in ejectment against them in the revenue Court are not without jurisdiction : 6 O.L.J. 639 and 1 O. C. 231, Foll. (*Raza, J.*) GULAB SINGH *v.* ALI BEGAM. **110 I.C. 50=5 O.W.N. 190= 10 L.R.A. Rev. 24=A.I.R. 1928 Oudh 230.**

—S. 60—Jurisdiction.

———*Civil Court.*

Where the landlord is suing in the civil Court a tenant for ejectment of the lands in his occupation, when the suit brought by the latter to contest the notice of ejectment has failed, but the landlord has not succeeded in getting possession of the land, the landlord's suit brought in the civil Court is not maintainable. The proper course for him to take is again to apply to the revenue Court for assistance to eject the tenant under S. 60 of the Oudh Rent Act, and as long as that has not been done, the landlord is not entitled to treat the tenant as a trespasser and to sue for his ejectment in the civil Court : 1890 S.C. 180 and 1 U.D. B.R. 318, Rel. on. (*Gokaran Nath Misra, J.*) ANNAPURNA KOER *v.* RAM RATAN SINGH. **97 I.C. 893=3 O.W.N. Sup. 162= A.I.R. 1926 Oudh 555.**

OUDH RENT ACT (1886), S. 107-A—Suit for possession.

—S. 68—Thekadars.

A landholder ejected certain tenants from their holdings and granted a lease of the holdings to the manager of his estate on payment of a fixed rent and the manager restored the ejected tenants to cultivatory possession of the area on their paying him a higher amount as rent plus a small grain rental, the manager receiving this substantial benefit in lieu of his salary as manager :

Held : that the manager was a person to whom the collection of rents in a portion of the village had been leased by the landlord and thus was technically a thekadar but actually an assignee of rent and that the tenants were not sub-tenants of the manager but tenants-in-chief of the landlord and that a suit by the landlord for declaring that he was not the landlord was cognizable by the Civil Court. (*Stuart, C. J. and Raza, J.*) NAGESHAR SAHAI *v.* MOHAN. **105 I. C. 103=4 O.W.N. 805= A.I.R. 1927 Oudh 529.**

———*Lease by.*

The *thekadar* has the ordinary powers of a landlord including the power to grant a lease. (*Simpson, A. J. C.*) BHUSAN *v.* JAGESHWAR. **80 I.C. 199= A.I.R. 1922 Oudh 216.**

—S. 70—Applicability.

———*S. 70 applies to those tenants who have received "patta."*

Section 70 applies to those tenants who have already received a " patta." In a suit for arrears of rent where it is not shown that the tenant has been granted a patta, it is possible to admit oral evidence. (*Pullan, J.*) MOHAMMAD ISMAIL KHAN *v.* ABDUL GHAFFAR BEG. **6 O.W.N. 1060=11 L.R.A. Rev. 28= A.I.R. 1930 Oudh 110.**

—S. 72—Gujra land.

There is nothing in the provisions of Chapter 7 to show that land which is held as *Guzara* at the time of the resumption proceedings or which has been so held in the past is excluded from the jurisdiction of the Revenue Courts. (*Kendall, A.J.C.*) JAI INDAR BAHADUR SINGH *v.* BACHU SINGH. **83 I.C. 382= 79 I.C. 1051=27 O.C. 273=A.I.R. 1924 Oudh 390.**

—S. 101=Insolvency proceedings.

Rent is a charge on property and landlord is a secured creditor in insolvency proceedings. (*Dalal, J.C.*) BISHAMBHAR NATH *v.* RUKKA. **81 I.C. 647= 10 O.L.J. 442=5 L.R. Oudh 98=27 O.C. 99= A.I.R. 1924 Oudh 296.**

—S.107-A—Suit for possession.

———*Jurisdiction.*

A Civil Court is barred by S. 108 (5-A) to entertain a suit for possession, when the allegations made in the plaint make the provisions of S. 107-A applicable; the Court must in such a case return the plaint for

OUDH RENT ACT (1886), S. 107-A—Transferability of Muafi land.

presentation to proper Court. (*Wazir Hasan, A.J.C.*) JAGDISH BAHADUR SINGH *v.* BENI PRASAD.

89 I.C. 813=A.I.R. 1926 Oudh 150.

—S. 107-A—Transferability of Muafi land.

———*Jurisdiction.*

Whether a muafi grant is a transferable one according to the conditions laid down therein, is a question for decision by a Revenue Court and not by a Civil Court. (*Neave and Kendall, A.J.Cs.*) UMAN RAWAN PRATAB BAHADUR SINGH *v.* HUB RAJA.

84 I.C. 116=11 O.L.J. 481=A.I.R. 1924 Oudh 422.

—S. 107-H—Assessment of rent.

———*Reservation of land.*

Where a person sold his rights in the village to another reserving to himself a certain area free of rent.

Held : that the Revenue Courts had jurisdiction to assess rent upon the area so reserved and that this jurisdiction was not ousted by S. 79 of the Land Revenue Code. (*Daniels, J. C.*) UMANATH BAKSHSINGH *v.* JANKI BAKSH SINGH. **86 I.C. 864=12 O.L.J. 226=2 O.W.N. 199=29 O.C. 10=A.I.R. 1925 Oudh 410.**

—S. 107-H—Declaration of right.

———*Under-proprietor.*

Rent Court has jurisdiction to declare status of person as under-proprietor. The exceptions contained in the proviso relates to suits to resume possession of, to have rent assessed on, and to enhance rent of any land held rent free or at favourable rate of rent. (*Wazir Hasan and Neave, A.J.Cs.*) RAJA BISHUNATH SARAN SINGH *v.* UMADAT. **78 I.C. 150=11 O.L.J. 255=A.I.R. 1924 Oudh 415.**

—S. 107-H—Declaratory suit.

The setting up of an under-proprietary right as can be created under S. 107-H does not give the landlord a cause of action to sue for declaration that the person has no rights which he set up : 20 O.C. 8 (P.C.) Expl. (*Stuart, C.J. and Raza, J.*) UMANATH BAKSH SINGH *v.* RAM BAKHSH. **94 I.C. 343=1 Luck 202=13 O.L.J. 229=6 O.W.N. 1217=A.I.R. 1926 Oudh 428.**

—S. 107-H—Decree for rent.

A Revenue Court can pass a decree for arrears of rent against an under-proprietor, who has not been assessed to rent either under S. 79 of the Land Revenue Act or under S. 107 (h) of the Oudh Rent Act, but who has been occupying the land for a long time and has been paying rent. 20 O.C. 171, Ref. (*Kendal and Pullan, A.J.Cs.*) BHAGWAN BAKSH SINGH *v.* BHAGWATI DIN. **84 I.C. 744=27 O.C. 228=A.I.R. 1925 Oudh 111.**

—S. 107-H—'Successors'.

The word "successors" in the section includes a heir as well as a transferee, and the Court cannot limit the meaning of the word to the former only. (*Lovett, S. M. and Ferard, J. M.*) DEPUTY COMMISSIONER, HARDOI *v.* PURAI. **60 I.C. 641=7 O.L.J. (B.R.) 661=**

—S. 107-H.—Under-proprietary rights.

———*Jurisdiction.*

Primarily it is the revenue Courts and not the civil Courts who decide questions of under-proprietary rights and where finding of the revenue Courts is that the muafidar had attempted to sell muafi rights which cannot be sold and that consequently the vendee had no title and it was also held that a muafidar only acquires under-proprietary title under S. 107-H, Oudh Rent Act, when he is declared by a Court to have done so, the civil Courts are justified in declining to admit the case the decision on these points being within the owers of the revenue Courts. (*Pullan, J.*) KUSHAR

OUDH RENT ACT (1886), S. 108—Ejectment of—Thekadar.

DAS *v.* BALBHODDAR SINGH. **107 I.C. 872=4 O.W.N. 1269=10 L.R.A. Rev. 2=A.I.R. 1928 Oudh 153.**

———*Muafidar.*

A muafidar though of more than two generations, and 50 years standing cannot acquire under-proprietary rights as, an under-proprietary right under this section arises only when a declaration has been made by the revenue Court under this section. Such a declaration changes the status of a muafidar into that of an under-proprietor from the date on which it takes effect : 21 O. C. 124, Foll. (*Pullan, J.*) KUSHAR DAS *v.* BALBHADDAR SINGH. **107 I.C. 872=4 O.W.N. 1269=10 L.R.A. Rev. 2=A.I.R. 1928 Oudh 153.**

—S. 108—Appeal and revision.

Where a suit for arrears of rent is filed under S. 108 (2) before an Assistant Collector and a second appeal from such suit is filed before the District Judge, the District Judge in such case is not subordinate to the Chief Court and the order of the District Judge in such second appeal is not subject to revision by the Chief Court under S. 115, Civil P. C.; A. I. R. 1928 *Oudh* 214, *Affirmed*.

Per *Wazir Hasan, J.*—The District Judge in the exercise of his jurisdiction over appeals under S. 119 Oudh Rent Act is not a Court of Revenue. The District Judge in such cases being Civil Court, his order passed in such appeals is subject, to revision by the Chief Court under S. 115, of Civil P. C., (*Stuart, C.J., Wazir Hasan, Misra, Raza and Nanavutty, JJ.*) GAYA PRASAD *v.* KALAP NATH. **119 I.C. 357=6 O.W.N. 661=4 Luck. 539=A.I.R. 1929 Oudh 389 (F.B.).**

—S. 108—Declaration of title.

———*Jurisdiction.*

Where in a suit for declaration of title it was proved that the defendant (the superior proprietor) had cut trees on the lands alleged to belong to the plaintiff (under-proprietor) and the defendant pleaded title in himself :

Held : the suit was maintainable and civil Court was competent to grant the relief of declaration of title. (*Stuart, C. J. and Wazir Hasan, J.*) RAGHURAJ SINGH *v.* WALI MAHAMMAD.

101 I.C. 503=4 O.W.N. 421=2 Luck. 492=A.I.R. 1927 Oudh 188.

—S. 108—Dispossession by old Tenant.

———*Jurisdiction.*

Where a tenancy is relinquished and granted by the landlord to another tenant, it the subsequent tenant is dispossessed by the heirs of the former tenant, he can maintain a suit in civil Court for possession against them, treating them as trespassers, as such a suit is not excepted from the cognizance of civil Court by S. 108. (*Raza, J.*) BABOO *v.* LOTAN. **93 I.C. 57=8 L.R.A. Rev. 97=13 O.L.J. 466=A.I.R. 1926 Oudh 377.**

—S. 108—Ejectment of—Thekadar.

———*Civil Court.*

A thekadar is a tenant of a holding from which he ejects the last holder. When it comes into his possession it is open to him either to cultivate it himself or to transfer its cultivation to another person who becomes his sub-tenant. As a sub-tenant the transferee can acquire no rights, and when the thekadar's theka expires his sub-tenancy also expires. If, after that he continues in possession he is a trespasser and as such he can be ejected by a civil Court. (*Stuart, C.J. and Raza, J. on reference by Shrivastava, J.*) KRISHNA KUMARI DEVI *v.* TRIBHUVAN DAT. **114 I.C. 305=**

OUDH RENT ACT (1886), S. 108—Ejectment—Transferee.

5 O.W.N. 905=10 L.R.A. Rev. 216=A.I.R. 1929 Oudh 12.

—S. 108—Ejectment—Transferee.

———*Trespasser.*

An occupancy tenant who had planted trees conveyed his rights. The trees ceased to exist but the transferee raised the plea in a suit under S. 127 that he was a grove holder.

Held : that the sale conveyed only the right to trees and did not convey grove rights to the transferee. When the trees ceased to exist the landlord was entitled to treat the purchaser as trespasser and could sue him under S. 127. (*Pullan, J.*) BHAGIRATHI *v.* UDESH SINGH, **118 I.C. 759=A.I.R. 1929 Oudh 523.**

—S. 108—Jurisdiction of revenue Court.

———*Essential tests.*

One of the essential requirements for a suit to be cognizable by the revenue Court is that the parties must occupy a certain position in relation to each other. For instance, if the suit relates to the arrears of rent, the suit in order to be cognizable by the Court of revenue must be brought by a landlord against a tenant ; if a suit is for recovery of a certain holding it must, if it is to be cognizable by the revenue Court, be brought by a tenant against a landlord ; and similarly if a suit is for profits or settlement of accounts, the suit must, in order to be cognizable by the revenue Court, be brought by a co-sharer against the lambardar or against the other co-sharers. (*Misra, J.*) ALI KHAN *v.* SURAJ BALI. **121 I.C. 896=4 Luck. 535=7 O.W.N. 202=A.I.R. 1930 Oudh 193.**

—S. 108—Village papers.

———*Evidence.*

Village papers in which the plaintiffs' names are entered for over a period of 30 years as proprietors and of the defendants as tenants of the plots in suit, though not conclusive, are certainly *prima facie* proof of the plaintiffs' title to recover rent. (*Wazir Hasan, J.*) RAM SABAD *v.* RAM SARUP. **103 I.C. 497=A.I.R. 1927 Oudh 441.**

—S. 108 (2)—Determination of jurisdiction.

Plaintiff's merely alleging in plaint that defendant is trespasser is enough to make suit cognizable under S. 108 (2) and 127. (*Ashworth, A. J. C.*) MANI RAM *v.* WASI ALI. **86 I.C. 335=A.I.R. 1925 Oudh 477.**

—S. 108 (2)—Ejectment of tenant.

Where in the course of a judgment of a competent Court a person is described as a tenant and declared liable to pay certain sums by way of rent, he should be treated as a tenant and not a trespasser. He should be sued for rent as tenant under S. 108 (2) and not trespasser who should be held to have been treated as tenants for the purpose of the suit under S. 127 and no order of ejectment can follow as a consequence of a decree for rent. (*Stuart, C.J. and Pullan, J.*) MATADIN *v.* SPECIAL MANAGER, COURT OF WARDS.

115 I.C. 846=10 L.R.A. Rev. 185=7 O.W.N. 70=4 Luck. 390=A.I.R. 1929 Oudh 376.

—S. 108 (2)—Paramsana rent.

A suit for arrears of *paramsana* rent would lie in a Revenue Court under S. 108 (2) in the same way as a suit for arrears of rent of any other kind payable in respect of a cultivatory holding, (*Kanhaiya Lal, J.C.*) SAT DEO *v.* JAI NATH. **67 I. C. 808=9 O. L. J. 141=A. I. R. 1922 Oudh 75.**

—S. 108—Cl. (5-A)—Declaration of status.

Only Revenue Court can grant declaration of a person's status as under-proprietor. (*Wazir Hasan and Neave, A.J.Cs.*) RAJA BISHUNATH SARAN SINGH *v.* UMADUTT. **78 I. C. 150=11 O. L. J. 255=A. I. R. 1924 Oudh 415.**

OUDH RENT ACT (1886), S. 108—(10) Applicability. —S. 108 (5-A)—Ejectment of trespasser.

———*Civil Court.*

A suit by a landlord for the ejectment of a trespasser does not fall within group A covered by sub-Ss. (1) to 5 (a) and as such it is cognizable by the civil Court. (*Stuart, C.J. and Pullan, J.*) SAT NARAIN SINGH *v.* BADRI PRASAD SINGH. **107 I. C. 556=4 O. W. N. 1275=10 L. R, A. Rev. 7=A. I. R, 1928 Oudh 146.**

—S. 108 (5-A)—Finality of decision.

———*Revenue Court.*

The decision of the revenue Courts in resumption proceedings on the question whether a plot still retains the character of a grove or not must be deemed as final, and cannot be assailed in the civil Court : 3 O. L. J. 717, Foll. : 41 All. 203 ; A. I.R. 1926 Oudh 205 ; and 5 O. L. J. 639 ; Ref. : A. I. R. 1926 Oudh 458, Dist. (*Wazir Hasan, Ag. C. J. and Gokaran Nath Misra, J.*) SHEOSAGAR *v.* LACHHMAN.

114 I.C. 753=5 O. W. N. 1085=10 L. R. A. Rev. 220=4 Luck. 284=A. I. R. 1929 Oudh 60.

—S. 108 (5-A)—Sale by muafidar.

———*Revenue Court.*

Where it was not known under what circumstances a *muafi* was created, a suit by the zamindars for a declaration that they were not bound by a sale of the *muafi* effected by the *muafidars* and for possession was in effect a suit for resumption and was not triable by a Civil Court but only by a Revenue Court. 6 O. C. 110 and 22 O. C. 186, Dist. (*Lyle, A. J. C.*) GOPI CHARAN *v.* DURGA PRASAD. **65 I. C. 702=8 O. L. J. 472=A. I. R. 1921 Oudh 225.**

—S. 108 (6)—Declaration of occupancy rights.

———*Revenue Court.*

Suits to establish a right of occupancy in particular lands and for recovery of the occupancy of those lands, alleging illegal objection by the landlord, being within the exclusive jurisdiction of revenue Courts cannot be brought in civil Courts. 1 O.C. 210 ; 2 O.C. 96 ; 3 O. C. 365 ; 12 O.C. 164 ; and A. I. R. 1916 P.C. 150 ; Rel. on. (*Raza and Srivastava, JJ.*) SREE HARAKH *v.* JAGRANI. **111 I.C. 656 (Oudh).**

—S. 108 (10)—Applicability.

Cl. 10 does not apply to ejectment by third person. (*Shrivastava, J.*) PANCHU *v.* DY. COMMR, SULTANPUR. **113 I.C. 734=A. I. R. 1929 Oudh 226.**

———*Jurisdiction of Civil and Revenue Courts.*

Section 108 (B) refers to suits brought either by an under-proprietor of a tenant against the superior proprietor or the landlord. If, therefore, a suit has been brought by a person alleging himself to be a tenant against another person who has prevented him from taking possession of the holding, having himself taken possession of the same forcibly and illegally, the suit is not one contemplated to be cognizable by the revenue Court under S. 108.

The words "recovery of occupancy" indicate recovery of actual possession of the land as distinguished from merely constructive possession, and the words "illegally ejected" imply that the tenant was previously in possession and had subsequently been ejected.

Where a tenant has never been in possession of his holding but merely tries to recover that holding whether from the landlord or from any other person whom he alleges to be in illegal possession thereof, the suit cannot be considered to be one cognizable by the revenue Court. In order that a suit should be cognizable by the revenue Court, it must be alleged

OUDH RENT ACT (1886), S. 108 (10)—Applicability.

and found that the plaintiff was at some time previous to the institution of the suit in actual possession of the land whether himself or through his sub-tenants and had subsequently been ejected by the landlord. If some body else besides the landlord has illegally taken possession of the holding the remedy must be sought in the civil Court and not in the revenue Court.

The mere fact that the plaintiff paid the rent and the landlord accepted it does not in any way show that the plaintiff actually had at any time obtained possession of the holding which had been let out to him by the landlord.

The mere fact that the landlord is impleaded cannot convert the suit into a suit of the class contemplated by S. 108, Cl. (10) (*Stuart, C. J. and Gokaran Nath Misra, J.*) GAYADIN *v.* LODHI. **100 I. C. 199= 2 Luck. 137=4 O. W. N. 109=8 L.R.A. Rev. 145= A. I. R. 1927 Oudh 108.**

——*Civil Court.*

Cases capable of summary adjudication are made cognizable by the Revenue Court while those requiring an elaborate enquiry into questions of title, its origin and devolution are left to the Civil Court. When a person has been in actual cultivating possession it is easy enough to determine his right but when he is not in occupancy and sues on the basis of his title a long and careful enquiry is necessary.

Where the questions at issue were of an involved nature as to the effect of the contracts between the parties and the plaint disclosed the fact that the plaintiff obtained his title on 14th July, 1919 and had not been in occupation since.

Held that to such a case the provisions of S. 108 (10) of the Oudh Rent Act did not apply and the case was triable by Civil Court. (*Dalal, A.J.C.*) ASHIQ ALI *v.* GHULAM SARWAR. **74 I.C. 553= 5 L.R. Oudh 7=11 O.L.J. 18= A.I.R. 1924 Oudh 175.**

—S. 108 (10)—Decree for possession.

——*Suit to set aside.*

A decree by the Revenue Court for possession does not bar a civil suit by the defendant before the Civil Court, where the plaintiff before the Revenue Court had no proprietary or under-proprietary title but based his suit on a mere tenancy which is challenged by the defendant as a sham and fraudulent transaction. 21 O. C. 210 : Distinguished. (*Kanhaiya Lal, J. C.*) SHEO RATAN *v.* DEO DATTA. **66 I.C. 119=9 Oudh L.J. 98= A.I.R. 1922 Oudh 38.**

—S. 108 (10)—Jurisdiction of Revenue Court.

The exclusive jurisdiction of the revenue Courts is limited to suits brought by a tenant on the ground of his being illegally ejected by his landlord. But where a tenant comes into Court on the allegation that he has been dispossessed by the rival tenant, on the allegations made in the plaint, the case is excluded from the operation of S. 108, Cl. (10), Oudh Rent Act : 18 O.C, 48 : A.I.R. 1924 Oudh 14 Dist : A.I.R. 1927 Oudh 108, Expl. (*Srivastava, J.*) MINDAI *v.* SAJID ALI. **6 O.W.N. 1094=11 L.R.A. Rev. 24= A.I.R. 1930 Oudh 69.**

—S. 108 (10)—Mode of contesting notice.

The Oudh Rent Act does not contemplate any proceedings for contesting a notice issued under S. 21 other than a suit under S. 108 (10) of the Act. (*Raza and Bisheshwar Nath, JJ.*) GOPAL DATT *v.* RAMESHUAR. **7 O.W.N. 763=A.I.R. 1930 Oudh 422.**

—S. 108 (10)—Objection to jurisdiction.

A suit for possession was instituted by the plaintiff in the rent Court as a suit falling under S. 108, Cl. (10) of the Oudh Rent Act. The defendants objected to the jurisdiction of the rent Court to entertain that suit. The rent Court returned the plaint to be presented to the civil Court. The suit was accordingly laid before the civil Court.

Held : that the defendants cannot be permitted to turn round and say that the civil Court had no jurisdiction to entertain it. (*Wazir Hasan, A.J.C.*) SITA RAM SINGH *v.* ANSARI LAL. **90 I.C. 38= A.I.R. 1926 Oudh 152.**

—S. 108 (10)—Rival Claimants.

——*'Civil Court'.*

A suit between tenants claiming on rival titles setting up a different landlord is cognizable by civil Court and is not barred from its cognizance by S. 108 (10). (*Kendall, J.*) MAULA *v.* NASIRUDDIN. **95 I.C. 695=A.I.R. 1926 Oudh 513.**

——*Civil Court.*

A dispute between two parties, both claiming to be tenant of the same land under the same Zemindar, where the claimant has never held possession of the land, is within the jurisdiction of the Civil Court. 18 O.C. 48 Foll. 16 O.C. 105 Ref. (*Daniels, A.J.C.*) GAYA DIN SINGH *v.* CHAUHARJA PANDE. **73 I.C. 238=10 O.L.J. 178= A.I.R. 1924 Oudh 14.**

—S. 108 (10)—Suit by ejected muafidar.

Where a *muafidar* has attained the position of an under-proprietor under S. 107-H, Oudh Rent Act, on his ejectment without any process of law, he can sue his landlord for recovery of possession as an under-proprietor.

The transferee of the interest of a *muafidar* does not acquire such a title as can be enforced in a Civil Court, as the interest of a *muafidar* is untransferable. (*Dalal, J. C.*) BALADIN *v.* AJUDIA. **82 I.C. 443= 27 O.C. 355=A.I.R. 1925 Oudh 211.**

—S. 108 (10)—Suit by ejected tenant.

——*Civil Court.*

Where a tenant is wrongfully dispossessed by a person who obtains a lease from the landlord on the ground of the alleged relinquishment of the holding by the former, the ejected tenant can bring a suit in the Civil Court against the lessee. (*Raza, J.*) MAHABIR *v.* KHARGI. **105 I.C. 778= 4 O.W.N. 973=A.I.R. 1927 Oudh 508.**

—S. 108 (10)—Suit by ejected under-proprietor.

Where the act of cutting the wood from the plots of the plaintiff (under-proprietor) by the superior proprietor was treated by the plaintiffs as an act of dispossession and the relief for possession was clearly founded on that act.

Held : the suit as brought was one for possession on account of the illegal ejectment of an under-proprietor by the landlord, and as such was cognizable by the Rent Court and its cognizance by the civil Court was barred by the provisions of Cl. 10 of S. 108 of the Oudh Rent Act and a claim for damages in respect of the trees cut is equally barred under Cl. 9 (c) of the same section. (*Stuart, C. J., and Wazir Hasan, J.*) RAGHURAJ SINGH *v.* WALI MUHAMMAD. **101 I.C. 503=2 Luck. 492=4 O.W.N. 421= A.I.R. 1927 Oudh 188.**

—S. 108 (10)—Suit for contribution.

——*Civil Courts.*

Every suit for contribution found upon a decree is cognisable by the civil Courts. Therefore, where a superior proprietor obtains a joint decree for arrears of rent against the under-proprietors and recovers the amount in execution from some of the under-proprietors the latter's suit for contribution against the other

OUDH RENT ACT (1886), S. 108 (10 a & b)—Occupancy of holding.

under-proprietors lies in a civil and not in a revenue Court, as the suit does not fall under S. 108 (16), Oudh Rent Act. (*Simpson, A. J. C.*) SIDH NATH *v.* SHEO DAYAL. **89 I.C. 360=2 O.W.N. 571=12 O.L.J. 635=A.I.R. 1925 Oudh 683.**

—S. 108 (10 a & b)—'Occupancy of holding.'

Per *Hasan, J.*—The expression "occupancy of a holding" is used in both Cls. 10 (a) and 10 (b) and should bear the same meaning at both the places, that is, a suit for the recovery of the occupancy of a holding against the landlord. (*Stuart, C. J., Hasan and Ashworth, JJ.*) MT. MALUKA KUNWAR *v.* PATESWAR SINGH. **96 I.C. 672=1 Luck. 273=29 O.C. 378=3 O.W.N. 536=13 O.L.J. 665=A.I.R. 1926 Oudh 371 (F.B.)**

—S. 108 (10-b)—Interpretation.

Per *Ashworth, J.*—It will not be beyond benevolent interpretation which is particularly permissible in the case of Rent Acts to read into Cl. (10 b) the qualification "as against the landlord of the holding" : 10 O.C. 23, Diss. from. (*Stuart, C.J., Hasan and Ashworth, JJ.*) MT. MALUKA KUNWAR *v.* PATESWAR SINGH. **96 I.C. 672=1 Luck. 273=29 O.C. 378=3 O.W.N. 536=13 O.L.J. 665=A.I.R. 1926 Oudh 371 (F.B.)**

—S. 108 (10-b)—Right by inheritance.

——*Civil Court.*

A suit for recovery of possession of lands held in the right of occupancy tenancy by a person claiming title on the general law of inheritance against a person who is not a landlord is not barred by Cl. (10 b) of the Act from the cognizance of the civil Courts. (*Stuart, C.J., Hasan and Ashworth, JJ.*) MT. MALUKA KUNWAR *v.* PATESWAR SINGH. **96 I.C. 672=3 O.W.N. 536=29 O.C. 378=1 Luck. 273=13 O.L.J. 665=A.I.R. 1926 Oudh 371 (F.B.)**

—S. 108 (10-b)—Right of landlord to re-let.

Where the Court of Wards issued a notice as prescribed by law and entered upon the holding and the tenants instituted a suit impugning the proceedings and seeking relief under S. 108 (10) but the same was dismissed.

Held : that the Court of Wards became entitled to let the holding to another tenant. (*Raza and Bisheshwar Nath, JJ.*) GOPAT DATT *v.* RAMESHWAR. **7 O. W. N. 763=A.I.R. 1930 Oudh 422.**

—S. 108 (10-b)—Rival tenants.

——*Revenue Court.*

Sub-S. 10 (b) of S. 108 is not intended to be limited to suits against a landlord, and a suit for possession of an occupancy holding by one tenant against another is also intended to be brought under that section and to be decided in the Revenue Courts.

Pullan, A. J. C.—Obiter. It is doubtful whether S. 108 (10) (b) is intended to apply to suits which are not brought against the landlord. (*Kendall and Pullan, A. J. Cs.*) BIKARMAJIT SINGH *v.* MT. BANSARJI. **80 I.C. 271=11 O.L.J. 717=A.I.R. 1925 Oudh 274.**

—S. 108 (10-b)—Suit between co-tenants.

——*Civil Courts.*

A suit for possession by a joint tenant who has been dispossessed by his co-tenant does not fall under S. 108 (10) (b) and is cognizable by a Civil Court. (*Kendall, J.*) RAJ NARAIN *v.* SHAMBHU NATH. **95 I.C. 772=13 O.L.J. 741=A.I.R. 1926 Oudh 520.**

—S. 108 (10-b)—Suit by heirs of tenant.

A Civil Court has jurisdiction in a suit for recovery of possession of lands held in the right of occupancy

OUDH RENT ACT (1886), S. 108 (15)—Arrears of Revenue.

tenancy by a person claiming title on the general law of inheritance only when the suit is against a person who is not the landlord : A.I.R. 1926 Oudh 371 (F.B.) Foll. (*Stuart, C.J. and Wazir Hasan, J.*) RAJENDRA BAHADUR SINGH *v.* BIRJRAJ BAKSH SINGH. **98 I.C. 1055=3 O.W.N. 913=8 L.R.A. Rev. 17.**

—S. 108 (10-b)—Suit by reversioners.

——*Revenue Courts.*

The plaintiff sued for possession of certain lands on the ground that he and the defendant had together succeeded to the lands as the reversionary heirs after the death of a Hindu widow. The property in suit consisted of certain plots of culturable land and certain other plots bearing the character of groves. On the averments in the plaint and the pleadings in the case it was clear that the title on which the plaintiff's claim rested related to a tenancy holding under S. 48 of the Oudh Rent Act.

Held : that the cognizance of the suit by the Civil Court was barred by clause 10 (b) of S. 108 of the Oudh Rent Act.

Held : further that as the groves as also the agricultural area were held under the same tenancy and in the plaint no distinction was made between the two in respect of the plaintiff's title the title was the same, and that therefore the argument that the suit in so far as it related to the possession of the groves was cognizable by the Civil Court and that consequently the whole suit was cognizable by that Court, was untenable. 11 O.L.J. 717, Foll. 1 O.C. Supp. 1 and 1 O.L.J. 124, Dist. (*Dalal, J.C. and Wazir Hasan, A.J.C.*) ALGOO PATHAK *v.* SHAMI NARAYIN PATHAK. **89 I.C. 465=2 O.W.N. 435=A.I.R. 1925 Oudh 439.**

—S. 108 (13-a)—Illegal realization by Lambardar.

Suit against lambardar for illegal realization of rent lies exclusively in revenue Court. (*Misra, J.*) JAGANNATH *v.* BIKARMAJIT SINGH. **10 L.R.A. Rev. 204=A.I.R. 1929 Oudh 383.**

—S. 108 (14)—Joint Hindu family.

Clause (14), S. 108, refers to a suit brought by a sharer *i.e.*, a person who has a definite separate share, against a lambardar or co-sharer. A member of an undivided Hindu family has no such separate righ and cannot sue the karta or other members of the joint family for a share of the profits. (*Pullan and Srivastava, JJ.*) THAKUR SRI RAM SINGH *v.* SURAJPAL SINGH. **A.I.R. 1930 Oudh 221.**

—S. 108 (15)—Arrears of Revenue.

——*Suit for—Prejudice.*

In a suit by the lambardar against the co-sharers under Cl. 16, S. 108, for the recovery of arrears of revenue, the trial Court's finding was that there was an arrangement between the parties that the lambardar would make collections from a certain portion of the joint estate to recoup himself for the defendants' share of revenue, and that the lambardar had realized profits of the portion of the estate. The contention was that this conclusion could only be arrived at in a suit under Cl. 15 and not in a suit under Cl. 16. It was also contended that the suit was untenable in view of the arrangement between the parties,

Held : that the trial of the broad issue of the defendants' liability did not in any manner prejudice the plaintiff.

Held : likewise, that the finding of the lower Court itself concluded the matter in issue and consequently the suit was untenable. (*Wazir Hasan, J.*) JAGANNATH *v.* UMRAI SINGH. **106 I.C.569=4 O.W.N. 933=A.I.R. 1927 Oudh 468.**

OUDH RENT ACT (1886), S. 108 (15)—Co-sharer.

—S. 108 (15)—Co-sharer.

A mortgagee with possession is a co-sharer within the meaning of S. 108, Cl. (15) and can sue and be sued for profits. (*Raza, J.*) GAJADHAR SINGH *v.* HAR PRASAD SINGH. **94 I.C. 693= A.I.R. 1926 Oudh 462.**

———A lady who is recorded as holding some land in the village in lieu of her maintenance for her life without any power of alienation is "a sharer" entitled to sue for profits within S. 108, Cl. (15) 35 All. 548, Dist. 2 O.C, 64; 2 O.C. 299 and 34 All. 250, Ref. (*Kanhaiya Lal and Daniels, A.J.Cs.*) T. BISHWA NATH *v.* RAM RATH. **63 I.C. 187=8 O.L.J. 339= A.I.R. 1921 Oudh 154.**

—S. 108 (15)—Interest.

Though a lambardar may be liable for interest on profits for the period during which he has occupied the office of lambardar, he is not liable under any rule of law to pay interest for the time that he was merely a sharer in the village: A.I.R. 1924 Oudh 319 and 6 O.C. 89, Foll. (*Wazir Hasan, J.*) VIDYA DHAR *v.* DHOKELAL. **103 I.C, 173=1 L.C. 157= A I.R. 1927 Oudh 586.**

———*Lambardar's liability.*

Lambardar's liability for interest on profits claimed by a co-sharer cannot be founded on S. 73 of the Contract Act or on the provisions of the Interest Act, (*Wazir Hasan, A. J. C.*) ADITYA PRASAD *v.* CHOTE LAL. **78 I.C. 85=11 O.L.J. 206=5 L.R. Oudh. 99. A.I.R. 1924 Oudh 319.**

—S. 108 (15)—Joint Hindu family.

A suit for profits by one member of a joint Hindu family against another is maintainable. S. 108, is only concerned with the question whether the parties are recorded co-sharers. If the plaintiff is a recorded co-sharer he is entitled to maintain a suit for profits. (A.W.N. (1899) 206, Dist.) (*Daniels, A. J. C.*) MT. SOBHAT KUAR *v.* MT. RAJ DEVI. **73 I.C. 688= A.I.R. 1924 Oudh 118.**

—S. 108 (15)—Lambardar's charges.

———*Basis of.*

The charges should be allowed not on the amount of net profits but on the total amount of collections made by the lambardar. (*Srivastava and Pullan, JJ.*) ABDUL GHANI *v.* MT. ALI BEGAM. **123 I.C. 58=7 O.W.N. 338=A.I.R. 1930 Oudh 208.**

—S. 108 (15)—Liability of co-sharers to account.

———*Co-sharers making their own collections but found to collect more than their share—Co-sharer receiving less can call them to account for the same.*

The practice among the co-sharers of the village of collecting rents according to their shares cannot relieve either the lambardar or other co-sharers of the necessity to account to one who is admittedly a co-sharer. What should be done is that the amount collected by each co-sharer should be taken into consideration and the accounts settled as a whole. If any co-sharer is found to have collected less than his share out of the total collections and the other co-sharers to have collected more than their shares the former should be held entitled to call upon them to account for the same. (*Gokaran Nath Misra and Raza, JJ.*) RUKMANGAD SINGH *v.* BALBHADRA PRASAD. **111 I.C. 264=9 L.R.A. Rev. 333. A.I.R. 1928 Oudh. 9.**

—S. 108 (15)—Liability of lambardar.

———*Position of.*

A lambardar's liability to pay interest on the arrears of profits due to a co-sharer cannot be based on the provisions of the Indian Contract Act, 1872, nor on those of the Interest Act, 1839, but he can be charged with interest under certain circumstances on

OUDH RENT ACT (1886), S. 108 (15)—Suit for profits.

the ground that he stands in a fiduciary position towards his co-sharers and is liable to account: A.I.R, 1924 Oudh 319 and 6 O.C, 89, Rel. on.

In equity, the lambardar holds the position of a constructive trustee and as such is "only bound to use such due diligence and care in the management of the estate as men of ordinary prudence and vigilance would use in the management of their own affairs."

If the rents due from tenants have not been collected in their entirety for the reasons that the lambardar has not used such due diligence and care in the management of the estate, he is guilty of breach of trust. He would also be guilty of breach of trust if he fails to divide at the appointed times such profits as may be divisible among the co-sharers and if his failure to do so can be attributed to his negligence in the management of the estate. The determination of the question of negligence or want of due diligence must necessarily depend on the particular circumstances of each case.

In a case where breach of trust has thus occurred the Court of equity may compensate the co-sharer for the loss, if any, in either of the two ways by charging the lambardar: (1) with gross rental or (2) with interest on the actual realizations. (*Wazir Hasan, J.*) SHIVA DAYAL SINGH *v.* RAM NARAIN. **104 I.C. 2= 4 O.W.N. 694=A.I.R. 1927 Oudh 332.**

—S. 108 (15)—Right to share profits.

———*Adverse possession.*

It is sufficient in a suit under Cl. 15, S. 108 for the plaintiff, in order to establish *prima facie* his title to the share, to prove that he is a recorded co-sharer and it is not necessary that he should also prove that he received profits at some time within 12 years prior to the institution of the suit, or that he was in possession at the time the profits claimed by him became due. No adverse possession of the defendant can be inferred from the fact of the plaintiff having received no profits of share in the absence of evidence showing that it was owing to the denial of the plaintiff's title that he did not receive profits: 1 O.C. 143, Foll. (*Raza, J.*) RAM BALI *v.* PARAS RAM. **110 I.C. 561= 10 L.R.A. Rev. 95=A.I.R. 1928 Oudh 463.**

—S. 108 (15)—Suit by lambardar.

Suit under S. 108 (15) includes a suit by a lambarda r for profits as a sharer against his co-sharers. (*Wazir Hasan and King, JJ.*) BANSIDHAR *v.* MATADIN **101 I.C. 196= 4 O.W.N. 225= A.I.R. 1927 Oudh 158.**

—S. 108 (15)—Suit for profits.

———*Liability of Lambardar.*

It is open to the Courts, in awarding a share of the profits of an estate in favour of a sharer as against a lambardar to find upon the facts that the lambardar has collected more than what he admits, and to give a share of profits based upon such a finding. Merely because a lambardar has been unable to produce accounts, he cannot be held to be liable on the basis of demands rather than of realizations and in the absence of proof of negligence and misconduct a proper decree to be passed in such a case is on the basis of collections. But where negligence and misconduct have been proved, it is open to theCourt to pass a decree on the basis of demands : A.I.R. 1926 Oudh 593, Foll. (*Stuart, C.J, and Raza J.*) GAJADHAR SINGH *v.* BARMAHA DATT SINGH. **102 I.C. 268=1 L.C. 27= A.I.R. 1927 Oudh 533.**

——In a suit by a co-sharer against the lambardar for a share of profits, the defendant failed to produce any account of the collections and disbursements made by

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him as lambardar and the plaintiff was given a decree on the basis of gross rental.

Held: that the defendant's negligence amounted to a breach of fiduciary duties imposed on him in the charactar of a lambardar, but still he should not be saddled with interest when the decree awarded to the plaintiff his share in the profits of the mahal on the basis of gross demands or rental: A.I.R. 1927 Oudh 337 (F.B.,) and A.I.R., 1927 Oudh 332, Rel on (*Wazir Hasan and Gokaran Nath Misra, JJ.*) CHITAR KET SINGH *v.* KANHAIYA BAKHSH SINGH.

106 I.C. 204=4 O.W.N. 930=A.I.R. 1927 Oudh 481.

——It is open to the Courts in awarding a share of the profits of an estate in favour of a sharer as against a lambardar to arrive at a conclusion upon the facts, that the lambardar has collected, more than he admits that he has collected, and to give a share of profits based upon such a finding; but the law does not contemplate that merely because a lambardar has been unable to produce accounts, he must therefore be held to be liable on the basis of demands rather than of realization: 1 O.L.J. 184; 7 O.L.J. 278 and A.I.R. 1922 Oudh 149, Dist. (*Stuart, C.J. and Raza J.,*) FATEH NARAIN DAS *v.* ABDUL RAHMAN.

99 I.C. 217=3 O.W.N. 775=8 L.R.A. Rev. 35=13 O.L.J. 818=A.I.R. 1926 Oudh 593.

———Where in a suit for profits under S. 108, Cl. 15, the lambardar failed to file accounts and he was found to be literate a decree was passed against him on gross rental. (*Simpson, A.J.C.*) JAGRAM *v.* IQBAL NARAIN **80 I.C. 441=5 L.R. Oudh 82=A.I.R. 1924 Oudh 347.**

———*Alienee from widow.*

A co-sharer need not be a full proprietor to entitle him to file suit against the lambardar for his share of the profits.

Therefore, there is no reason why a person to whom a Hindu widow has conveyed her rights for her life should not have a power to sue for the share of the profits to which, but for such transfer, the widow would have been entitled. (*Kanhaiya Lal, J.C.*) THAKAR PRASAD SINGH *v.* ADYA PRADA SINGH.

66 I.C. 2=24 O.C. 399=A.I.R. 1922 Oudh 79.

—S. 108 (15)—Transferee of co-sharer.

———*Assignment of arrears—Civil Court.*

Where a co-sharer transfers his interest to another person and along with it assigns his claim for the profits accruing before the transfer, the suit by such transferee for the share of the profits is not cognizable by the Revenue Court but by the Civil Court. (*Misra, J.*) ALI KHAN *v.* SURAJ BALI. **121 I.C. 896=4 Luck. 535=7 O.W.N. 202=A.I.R. 1930 Oudh 193.**

—S. 108 (15)—Usufructuary mortgagor.

———*When can sue for profits.*

A usufructuary mortgagor can sue for the recovery of his share of profits under S. 108, Cl. (15), where the mortgagee, in spite of a civil Court decree in his favour and formal delivery of possession in pursuance thereof never obtains an order of entry of his name in the revenue records and is not in possession of the share. (*Wazir Hasan, J.*) BALKARAN DUBE *v.* HARBILAS. **106 I.C. 299=4 O.W.N. 950=A.I.R. 1927 Oudh 504.**

—S. 108 (16)—Lambardar's right to rent.

———*Cessation of his tenure,*

A lambardar has a right to collect as lambardar the rents due during his tenure though he subsequently ceases to be so and he holds the rents thus realized to be distributed amongst the persons entitled in law to receive them. (*Stuart, C.J. and Raza, J.*) MT. PATHRAJ KUAR *v.* JADUNATH BAKHSH SINGH.

105 I.C. 161=4 O.W.N. 1012=A.I.R. 1927 Oudh 517.

OUDH RENT ACT (1886), S. 119—Second appeal.

—S. 116—Decree by Assistant Collector.

———*Appeal.*

Where the decree is the decree of an Assistant Collector of the 2nd class an appeal lies to the Collector or to a specially empowered Assistant Collector. The next appeal where the value of the original suit does not exceed Rs. 5,000 lies to the District Judge and where the value of the suit exceeds Rs. 5,000, lies direct to the Chief Court. In the former case, the Courts of Assistant Commissioner and District Judge are not subordinate to the Chief Court: A.I.R. 1924 Oudh 16, Foll.; A.I.R. 1924 Oudh 349, Diss.; A.I.R. 1923 Oudh 18, Expl. (*Stuart, C.J. and Pullan, J.*) NARAYAN *v.* BALDEO SINGH.

107 I.C. 877=3 Luck 150=9 L.R.A. Rev. 358=4 O.W.N. 1258=A.I.R. 1928 Oudh 214.

—S. 119—Forum of appeal.

If a suit is one under S. 108, Cl. (4) based on the provisions of S. 61, appeals from orders in such suits lie to the Commissioner and the Board of Revenue and not to the District Judge or the Chief Court. (*Shrivastava, J.*) NAUNIHAL SINGH *v.* SARDAR BUX SINGH. **112 I.C. 229=A.I.R. 1929 Oudh 96.**

———Appeal against the decree for ejectment passed under sub-S. (2), S. 127 lies to the Commissioner and the Board, whereas a decree for arrears of rent passed under sub-S. (1) S. 127 is appealable on the civil side. (*Raza, J.*) BAM BAHADUR SINGH *v.* PIRTHI-SINGH. **112 I.C. 251 (Oudh).**

—S. 119—Revision.

The plaintiffs filed certain suits for rent which were heard by an Assistant Collector of the second class. On appeal his decrees were confirmed by the Collector. There were further appeals to the District Judge, which were unsuccessful. The defendant then applied in revision under S. 115, C. P. Code for the discharge of the decree passed by the District Judge.

Held: that an application for revision to the High Court in these circumstances is not maintainable. (*Kanhaiya Lal, J. C.*) KALI BAKHSH SINGH *v.* BHAGWAN DAS. **72 I.C. 1023=10 O.L.J. 191=5 L.R. Oudh 17=A.I.R. 1924 Oudh 16.**

—S. 119—Right to appeal.

———*Person 'affected'.*

S. 119 of the Rent Act, grants an appeal from an original decree of an Assistant Collector of First Class, and it is not specifically stated that only the person against whom a decree is passed shall be entitled to appeal against it. A party to a suit whose interest is affected by a decree is entitled to appeal from that decree though the decree was not specifically passed against him. 21 All. 117, Foll. (*Dalal, A.J.C.*) SURAJ BAKHSH SINGH *v.* MUNNU LAL.

76 I.C. 763=10 O.L.J. 229=26 O.C. 374=A.I.R. 1924 Oudh 52.

—S. 119—Second appeal.

Under S. 119 of the Oudh Rent Act a second appeal is barred on grounds other than those contained in S. 100, Civ. Pro, Code. (*Wazir Hasan and Ashworth, A.J.Cs.*) TIRBHAWAN DATT PANDE *v.* RAM PIARI. **88 I.C. 68=A.I.R. 1926 Oudh 56.**

———*District Judge—Question of fact.*

The word "appeallate" was added to S. 119 by Act No. IV of 1921 in order to remove second appeals in rent and cognate suits from the cognizance of the Commissioner under S. 116 and to give jurisdiction over them to the District Judge and not with a vie w

OUDH RENT ACT (1886), S. 119-B—Revision.

to make the Dt. Judge a Judge of facts in second appeal, contrary to well recognized principles of legislation in India, and therefore Dt. Judge cannot go in questions of fact in dealing with second appeals in Rent Suits. (*Dalal, J.C.*) JAGANNATH PERSHAD *v.* BECHU. **80 I.C. 327=27 O.C. 89=11 O.L.J. 77=5 L.R. Oudh 78=A.I.R. 1924 Oudh 349.**

—S. 119-B—Revision.

Where a suit is originally instituted into the Court of the Assistant Collector of the second class and against his decision an appeal is filed to the Deputy Commissioner, a second appeal is filed in the Court of the District Judge. The decree passed by the District Judge is one on appeal from an appellate decree and no appeal or revision lies to the High Court. (*Misra, J.*) FATEH BAHADUR KHAN *v.* CHHOTEY KHAN. **109 I.C. 794=5 O.W.N. 457=10 L.R.A.R. Cr. 207.**

—S. 124-B—Object.

Provisions of S. 124 B and C of the Oudh Rent Act are salutary provisions intended to save litigants from being bandied about from Court to Court and they should be strictly observed by the District Judge. (*Simpson, A.J.C.*) JAGRANI *v.* IQBAL NARAIN. **80 I.C. 441=5 L.R. Oudh 82=A.I.R. 1924 Oudh 347.**

—S. 126—Lease.

———*Grove —Managing co-sharer.*

A managing co-sharer has no right to grant permission to plant groves on land held jointly without the permission of the other co-sharers. But where it is found that in consequence of such permits the groves have been planted, the other co-sharers are entitled to receive proportionate share of the rent and nazarana received by the managing co-sharer and the burden of grant would at the time of partition fall on share of the managing co-sharers : A.I.R. 1928 Oudh 23, Foll. (*Misra, J.*) MT. KANIZ SAIYADA BEGUM *v.* MOHAMMAD ZAFAR. **117 I.C. 410 (Oudh).**

———*Lambardar's powers of sub-letting.*

The mere fact that a wajib-ul-arz authorizes a lambardar to make certain collections cannot be construed as preventing him from making a lease for making those collections by implication. If it is found that in the circumstances of a particular case it was for the benefit of the co-sharers or necessary for the proper management of the estate that a lease should be granted, there is nothing in the wajib-ul-arz which prevents the lambardar from exercising his general powers in the matter. (*Shrivastava, J.*) JIT BAHADUR SIHGH *v.* CHANDRA PAL SINGH. **111 I.C. 834=5 O.W.N. 693=10 L.R.A. Rev. 98=10 L.R.A. Rev. 208=A.I.R. 1928 Oudh 406.**

—S. 126—Lease for grove.

———*Managing Co-sharer—Rights of.*

Managing co-sharer has no authority to grant prepetual leases for the purpose of planting groves.

Where one co-sharer in management has granted, without the permission of other co-sharers, a perpetual lease of joint land for planting grove and the lease is declared invalid, as against non-consenting co-sharers the fair arrangement would be to allow the lessee to remain in possession of the land in dispute on which he has already planted a grove and to ask him to pay to the non-consenting co-sharers their share of rent of the land and to allow the burden to fall upon the share of transferring co-sharer at the time of partition. (*Gokar Nath Misra, J.*) RAM DAT *v.* CHHOTAK. **106 I.C. 244=3 Luck. 133=4 O.W.N. 1019=9 L.R.A, Rev. 336=A.I.R. 1928 Oudh 23.**

OUDH RENT ACT (1886), S. 126—Powers of lambardar.

—S. 126—Omission to appoint manager.

———*Lambardar.*

In a joint estate or under-proprietary or other tenure in which division of land has not been made among the sharers, the person, who is entitled to exercise the powers conferred by the Act in regard to the recovery of the arrears of rent is the manager appointed on behalf of all the sharers, if the sharers have appointed a manager. But if the sharers have not appointed a manager it must be presumed that they have accepted the lambardar as their manager and authorized him to collect the rents : 11 O.L.J. 27, Diss. from; 18 O.C. 5 Appr. (*Stuart, C., J. Wazir Hasan and Gokar Nath Misra, JJ.*) MAHOMED YAKUB KHAN *v.* BHIKARI AHIR. **110 I.C. 67=3 Luck. 571=5 O.W.N. 366=10 L.R.A. Rev. 30=A.I.R. 1928 Oudh 266 (F.B.).**

—S. 126—Position of lambardar.

A lambardar is really a representative of the co-sharers and is in the position of a manager in respect of the joint estate. He is entitled to do acts which are necessary for the proper management of the estate or conducive to the benefit of the co-sharers. He cannot be considered to be an agent of the co-sharers under S. 190, Contract Act : 34 All. 98 and 36 All. 441 (F.B.), Rel. on. (*Shrivastava, J.*) JIT BAHADUR SINGH *v.* CHANDRA PAL SINGH. **111 I.C. 834=5 O.W.N. 693=10 L.R.A. Rev. 98=10 L.R.A. Rev. 208=A.I.R. 1928 Oudh 406.**

—S. 126—Powers of lambardar.

———*Limited admissions.*

Under S. 126 a lambardar has not unlimited powers to represent his co-sharers. His powers in the way of representation are strictly limited. A lambardar is not entitled in the course of ejectment proceedings to admit the existence of under-proprietary rights so as to bind all his co-sharers who were no parties to the suit in which the admission was made. Even if it could be supposed that these compromises were effected with the consent and knowledge of all the other co-sharers they do not constitute any estoppel where it is not proved that as the result of any admissions made in the course of the ejectment proceedings the defendants have altered their position to their prejudice or that there was any consideration for any such admission. (*Lindsay, J. C.*) HAR PRASAD UPADHYA *v.* BIKRAMAJIT SINGH. **61 I.C. 959=8 O.L.J. 131=A.I.R. 1921 Oudh 36.**

———*Commutation.*

Where there exists a local custom in mahal by virtue of which every co-s-harer of that mahal is entitled to collect rent, tenants paying rent in kind, it is not legally open to the lambardar to commute their rent into cash rent without the consent of all the co-sharers. The action of the lambardar thus commuting the grain rent into cash rent is not binding upon other co-sharers. (*Misra, J.*) BISRAM SINGH *v.* DANNA. **113 I.C. 794=A.I.R. 1929 Oudh 459.**

———*Collection of rent.*

The mere fact that the co-sharers make their own collections in a joint estate does not amount to a 'division of land' among them, and does not take the case out of the provisions of S. 126 and disentitle the lambardar from collecting rents and doing all necessary acts relating to the management of the estate for the common benefit of all the co-sharers. The "Manager" referred to in Cl. (1), S. 126 of the Act must be the lambardar : 18 O. C. 5, Foll. (*Gokar Nath Misra and Raza, JJ.*) RUKMANGAD SINGH *v.*

OUDH RENT ACT (1886), S. 126—Recovery of rent.

BALBHADRA PRASAD. **111 I.C. 264= 9 L.R.A. Rev. 333=A.I.R. 1928 Oudh 9.**

—S. 126—Recovery of rent.

Wilful conduct ot a lambardar supporting the case of a tenant against his co-lambardars cannot be allowed to thwart the legal right of the other lambardars recovering the arrears. (*Wazir Hasan, J.*) PARAN SINGH *v.* KUNJAN LAL. **101 I.C. 830= 4 O.W.N. 506=A.I.R. 1927 Oudh 223.**

———In a case falling under Cl. 2 of S. 126, the lambardar is entitled to collect rent from the tenants on behalf of other co-sharers, and is liable to the latter for the collections. (*Wazir Hasan, A. J. C.*) KUNJAN LAL *v.* RUKMANGAD SINGH. **87 I.C. 1013= A.I.R. 1926 Oudh 169.**

———*Joint State.*

Ordinarily the power in regard to the recovery of the arrears of rent shall not be exercised by a sharer or a single lambardar when there are more lambardars than one in a joint estate. (*Dalal and Wazir Hasan, A. J. Cs.*) MAYA RAM *v.* SARJOO BRAHMAN. **87 I.C. 168=12 O.L.J. 185=2 O.W.N. 150= 28 O.C. 389=8 L.R.A. Rev. 9= A.I.R. 1925 Oudh 455.**

———*Authority.*

Authority to collect rent under S. 126 need not be in writing. Oral authority is enough. (*Dalal, J. C.*) DEBI PRASAD *v.* LEKH RAJ. **76 I.C. 1050= 10 O.L.J. 349=5 L.R. Oudh 14= A.I.R. 1924 Oudh 244.**

—S. 126—Scope.

Section 126 refers only to certain acts of management, recovery of arrears of rent, enhancement of rent, ejectment of tenants or distress. It lays down a rule for the exercise of the specific powers. It cannot be of any help in determining the rights of lambardar or co-sharers in other matters not referred to in the section. (*Shrivastava, J.*) JIT BAHADUR SINGH *v.* CHANDRA PAL SINGH.

111 I.C. 834=10 L.R.A. Rev. 93= 10 L.R.A. Rev. 208=5 O.W.N. 693= A.I.R. 1928 Oudh 406.

—S. 127—Amendment of plaint.

The original plaint for the recovery of arrears of rent from the tenants can be so amended as to make it a claim under S. 127. Oudh Rent Act where there is no allegation in the plaint as originally presented that defendants were liable to pay rent under an agreement between the parties. (*Wazir Hasan, J.*) MT. JAGGI *v.* SHEO PRATAP SINGH. **105 I.C. 81= 4 O.W.N. 945=A.I.R. 1927 Oudh 505.**

—S. 127—Appeal.

A decree for ejectment is appealable to Civil Courts along with the appeal against the decree for arrears of rent and no separate appeal lies to a Court of revenue against the decree for ejectment: A.I.R. 1929 Oudh 79, Foll. (*Wazir Hasan, Ag. C. J.*) SARFARAJ SINGH *v.* DEPUTY COMMR., GONDA. **117 I.C. 475= 4 Luck. 517=7 O.W.N 191= A.I.R. 1929 Oudh. 481.**

———There is no apppeal against an order of ejectment under S. 127 following a decree for arrears of rent. (*Stuart, C.J.*) *and Pullan, J.*) MATADIN *v.* SPECIAL MANAGER, COURT OF WARDS.

115 I.C. 846=10 L.R.A. Rev. 185= 7 O.W.N. 70=4 Luck. 390= A.I.R. 1929 Oudh 376.

———Where a decree for ejectment passed along with a rent decree order S. 127 (2) is against a person who is not a tenant but who is treated as such for the purposes of S. 127 (1) the decree is one under S. 108 (2) and is appealable to Civil Courts. No separate appeal lies against the order of ejectment. (*Stuart, C.J. and Pullan, J.*) RAM BAHADUR SINGH *v.* DHARAM RAJ SINGH. **114 I.C. 761= 5 O.W.N. 1126=A.I.R. 1929 Oudh 79.**

—S. 127—Applicability.

Section 127 embraces the case of a person who though originally entered lawfully into possession of land but has unlawfully retained possession: 15 O.C. 311; A.I.R. 1926 Oudh 555 and 1 O.C. 28 Dist, (*Wazir Hasan, J:*) GAJADHAR SINGH *v.* BHAGAWAN BUKSH SINGH.

A.I.R. 1930 Oudh 166.

———*Bonafide tenant.* **7 O.W.N. 44=**

Where parties claim to be entitled to a particular land and one of them is in actual possession of the same, the other party cannot be allowed to take possession of that land by bringing a suit for arrears of rent against the tenant in actual occupation of the land under S. 127. The section was never intended by the legislature to cover such a case. That provision of law is only intended to cover a case where the person cannot show himself to be a bona fide claimant of the land in dispute and where his possession must be held to be that of a pure trespasser. In that case it would be upon the landlord to either sue the person in possession for ejectment in the civil Court or to treat him as tenant and sue him for arrears of rent in the revenue Court. Where, however, another person claims to be the owner of the land and has been in possession thereof for a long time and a tenant is in occupation of that land on his behalf, proceedings under S. 127 cannot be availed of in order to obtain possession of the same land A.I.R. 1928 Oudh 353, Ref. (*Misra J.*) UMRAI KUER *v.* UMRAO.

118 I.C. 811= 10 L.R.A. Rev. 198= A.I.R. 1929 Oudh 378.

———*Adverse possession.*

If the person against whom action is taken under S. 127 has maintained adverse possession continuously for 12 years against the rightful owner, then the rightful owner is not entitled to eject such a person as a trespasser and, therefore, S. 127 is inapplicable to such a case. (*Wazir Hasan, J.*) P. SHEO DULANEY *v.* SHEO SHANKER.

101 I.C. 849=1 L.C. 76=A.I.R. 1927 Oudh 219.

———Section 127 is intended to cover the case of a person who has actually taken possession of the land tor the purpose of cultivation. It is not intended to cover the case of a person who has merely realized rent of the land which had originally belonged to him but subsequently ceased to be his property, and who has thus caused the dispossession of the person in present possession: 1 O. L. J. 701; 4 U. D. 617; and 18 I. C. 575; Appl. (*Misra, J.*) BADRI BISHAL SINGH *v.* RAM AUTAR. **94 I. C. 369=29 O.C. 266= 3 O.W.N. 370=A.I.R. 1926 Oudh 417.**

———Plaintiff brought a suit for arrears of rent and alleged that the terms of the tenancy were contained in a *kabuliyat*. He also alleged that he had received payments of rent from the defendant. The defendant set up a *quasi*-proprietary title. He did not admit that he was plaintiff's tenant at all. He denied the *kabuliyat* and he denied the payments of rent. The *kabuliyat* was found to be not genuine, and no rent was found to have been paid.

Held, that the plaintiff can set up no case under S. 32-A, because no rent has been agreed upon between him and his tenant, nor can he proceed under S. 32-B because he has failed to prove that the defendant is a tenant at all, and that he cannot succeed under S. 127 because he has failed to show

OUDH RENT ACT (1886), S. 127—Applicability.

that the defendant is a person not entitled to possession. (*Simpson, A.J.C.*) TAWAKKUL KHAN *v.* MD. MEHDI ALI KHAN. **90 I.C. 375= A.I.R. 1926 Oudh 49.**

——*Ejectment.*

When a suit for recovery of rent is brought against a trespasser under S. 127 of the Oudh Rent Act the Court after a decree for rent is passed is bound to pass a decree for ejectment also on application made by the plaintiff. But such a provision is not made applicable to proceedings in ejectment. (*Dalal, J.C.*). KHAKI SINGH *v.* BISHUNATH LAL. **86 I.C. 447= 12 O.L.J. 86=2 O.W.N. 14= A.I.R. 1925 Oudh 388.**

—S. 127—Arrears of rent.

——*Alternative plea.*

Where in a suit for the recovery of arrears of rent, the plaintiff founded his claim on a *kabuliyat* alleged to have been executed by the defendant and in addition to the *Kabuliyat* the plaintiff tried to prove that the defendant had been paying him rent as a tenant and the plaintiff's suit was dismissed on the ground of his failure to prove the *kabuliyat*.

Held, it was the duty of the Court to give a decision on alternative claim of the plaintiff namely that the defendant was occupying land as plaintiff's tenant apart from the *kabuliyat* and paying him rent. (*Kendall, A. J. C.*) MAHDI ALI KHAN *v.* TAWAKKUL, KHAN. **78 I.C. 764=A.I.R. 1925 Oudh 220.**

—S. 127—Burden of proof.

In order to bring a suit under this section the landlord must show first that the defendant is retaining possession of the land without being entitled to such possession, and secondly that he himself has the option of ejecting him as a trespasser. (*Pullan, J.*) BAIJ NATH UPADHIA *v.* GAZI KHAN. **106 I.C. 907= 10 L.R.A. Rev. 18=A.I.R. 1928 Oudh 219.**

—S. 127—Civil suit.

Even if the provisions of S. 127 apply to a case a civil suit cannot be barred when the Revenue Court did not apply its mind to the effect of that section, and in its order no mention is made of the provisions of S. 127, for in such a case there is no finding which can be binding on a Civil Court. A.I.R. 1922 All. 336 Dist. (*Dalal, J.C.*) KHAKI SINGH *v.* BISHUNATH LAL. **86 I.C. 447=12 O.L.J. 86=2 O.W.N. 14= A.I.R. 1925 Oudh 388.**

——*Ejectment suit.*

Under S. 127 the landlord gets a swift remedy through the Revenue Court for the collection of rent even from a trespasser. The landlord's other rights against a trespasser of agricultural land are not thereby lost. He can therefore maintain a suit to eject the trespasser in the Civil Court. (*Dalal, A. J. C.*) RAM CHARAN *v.* CHAMPAT SINGH. **80 I.C. 819= 11 O.L.J. 11=5 L.R. Oudh Rev. 27= A.I.R. 1924 Oudh 222.**

—S. 127—Construction.

———*Strict.*

The provision of S. 127 are exception to the general law and therefore. they should be strictly construed. (*Wazir Hasan, C.J. Raza and Srivastava, JJ.*) BAIJNATH PRASAD *v.* GAJADHAR BAKSH. **7 O.W.N. 551=A.I.R. 1930 Oudh 281 (F. B.).**

—S. 127—Cultivated Grove.

——*Applicability of the section.*

Where landlord sued for arrears of rent under S. 127 with respect to a plot of land which had been recorded as a cultivated grove in the record of the regular settlement and since then there had admittedly been no change in its character.

Held, that S. 127 was not applicable as it could not be said that the defendant had brought the land

OUDH RENT ACT (1886), S. 127—Essentials for applicability.

under his cultivation without the consent of the landlord, there being in fact no change in its character at all. (*Daniels, J. C.*) RUDRAPRATAP SINGH *v.* HAUSLA PRASAD. **79 I.C. 722=10 O.L.J. 524= 5 L.R. Oudh 119=A.I.R. 1924 Oudh 295.**

——*Meaning of 'Rent free.'*

A landlord can proceed under S. 127 of the Act against the tenant who has brought a grove under cultivation by notice of ejectment. The term 'rent free' implies that the land is held under an agreement exempting it from rent. (*Hopkins, S.M. and Porter, J.M.*) PANCHAM LAL *v.* NIHAL SINGH. **61 I.C. 192=8 O.L.J. 60.**

—S. 127—Decree for rent and ejectment.

When a Court passes a decree for arrears of rent under sub-S. (1), S. 127 read with Cl. (2), S. 108, it is open to the Court, on the application of the plaintiff, to also pass a decree for ejectment of the defendant from the land. (*Srivastava, J.*) CHHATTARPAL SINGH *v.* BHADESHWAR PRASAD SINGH. **11 L.R.A. Rev. 18=A.I.R. 1930 Oudh 49.**

———Under S. 127 (2) when a Court passes a decree for arrears of rent, it should be also, if the plaintiff applies to that effect, pass a decree for the ejectment of the defendant from the land. (*Gokaran Nath Misra, J.*) PRAYAG SING *v.* MANOHAR LAL. **111 I.C. 465=3 Luck. 616= 10 L.R.A. Rev. 78=5 O.W.N. 622= A.I.R. 1928 Oudh 369.**

——Under S. 127 (2) a decree of ejectment is a consequential relief to a decree for arrears of rent which shall be granted on a separate application of the plaintiff decree-holder. (*Wazir Hasan, J.*) MT. JAGGI *v.* SHEO PRATAP SINGH. **105 I.C. 87= 4 O.W.N. 945=A.I.R. 1927 Oudh 505.**

—S. 127—Ejectment and rent suit.

S. 127 of the Oudh Rent Act was enacted to provide for the case of a trespasser and to prevent such a case going out of the jurisdiction of the Revenue Courts. Under clause (2) of that Section a Court is bound to pass a decree for ejectment if such an application is made by the plaintiff when the Court passes a decree for arrears of rent. (*Dalal, J. C.*) PARMESHUR LAL *v.* MT. RUKMI. **75 I.C. 875= A.I.R. 1925 Oudh 305.**

—S. 127—Ejectment suit.

——*Not treating deft. as tenant.*

The fact, that the landlord after knowing that the original tenant was dead, passes receipts only in the deceased tenant's name, and enters the name of the defendant only in the column headed "name of person actually making payment," strongly shows that the landlord did not intend to treat the defendant as tenant and so landlord's suit to eject defendant is not barred on account of such receipts: 7 C.W.N. 132, Rel. on; 1 Cal. 391 (P. C.), Dist. (*Srivastava, J.*) SADHNOO *v.* BAIJU. **114 I.C. 768= A.I.R. 1929 Oudh 333.**

—S. 127—Erroneous admission.

———*Landlords.*

Where a landlord, erroneously believing defendant to be deceased tenant's heir sues him for ejectment under S. 62, and issues notice to him of ejectment, no weight can be attached to his erroneous admission that defendant was deceased tenant's heir in a suit for ejectment under S. 127. (*Srivastava, J.*) SADHNOO *v.* BAIJU. **114 I.C. 768=A.I.R. 1929 Oudh 333.**

—S. 127—Essentials for applicability.

A suit under S. 127 lies only against a person in actual possession of the land in respect of which the relief is claimed. The provisions of S. 127, however

OUDH RENT ACT (1886), S. 127—Grove-holder.

have no application in a case of a person who during the portion of the period in suit has been in actual possession, but who at the time of the institution of the suit is only in constructive possession : A.I.R. 1926 Oudh 417 Appr. ; 7 O.W.N. 21 Rel. on. (*Wazir Hasan, C.J., Raza and Srivastava, JJ.*) BAIJNATH PRASAD *v.* GAJADHAR BAKSH.
7 O.W.N. 551=A.I.R. 1930 Oudh 281 (F.B.)

—S. 127—Grove-holder.

———*Grove ceasing to exist,*

Where there is a special provision in the *wajib-ul-arz* of the village which entitles tenant grove-holder after the grove has ceased to exist to cultivate the land rate payable by tenants of the surrounding land, if the tenant grove-holder remains in occupation after the grove has disappeared, he cannot be treated either as a trespasser or tenant within the meaning of at a S. 127, he becomes entitled to cultivate the land at the prevalent rate of rent: 8 O.L.J. 60 (B.R.),Dist. (*Stuart, C.J. and Wazir Hasan, J.*) MT. MAHARAJI KUNWAR *v.* COURT OF WARDS. **7 O.W.N. 34= A.I.R. 1930 Oudh 144.**

—S. 127—Jurisdiction of Revenue Court.

Section 127 is not meant to authorize Revenue Court to inquire into questions of disputed title and to decide questions of a civil nature between persons who are *bona fide* claimants of the same property.

A suit was brought by the plaintiff under S. 127. Oudh Rent Act. He claimed the property under a deed of gift alleged to have been executed in his favour by the deceased. The defendants who were the nephews of the deceased denied the genuineness of the deed, and alleged that they and the deceased lived as members of a joint Hindu family, that the deceased was not competent to execute the deed in question, that he was not in his proper senses at the time the deed was alleged to have been executed by him and that the defendants were in actual possession of the property in suit.

Held : that the suit was not maintainable in a revenue Court. The questions involved in the case were essentially questions of title which should be decided by a Civil Court. (*Raza, J.*) ISHAR DIN *v.* SAMBU DAT. **110 I.C. 289=5 O.W.N. 495= 10 L.R.A. Rev. 44= A.I.R. 1928 Oudh 353.**

—S. 127—Lessor in possession.

Where a proprietor executes a lease of certain land but remains in possession thereof, his possession is unjustified in the eyes of law. The position of a transferee from him is no better and he can be treated as a trespasser and a suit for determination and recovery for rent can be brought against him. (*Misra, J.*) PARMESHWAR BAKSH SINGH *v.* NO-KHE SINGH. **118 I.C. 96=A.I.R. 1930 Oudh 42.**

—S. 127—Liability for rent,

———*Trespasser.*

A person entitled to eject another person, who is a trespasser on a holding, can claim under S. 127 arrears of rent against that person as if he were his tenant ; such a claim is not inconsistent with the position that the defendant is otherwise merely trespasser. (*Ashworth, A. J. C.*) LACHMI NARAIN *v.* RAMANUJ SINGH. **88 I.C. 536=A.I.R. 1925 Oudh 721.**

———*Unauthorised Occupation.*

Where lands are occupied without the consent of the landlord, the person occupying the land must pay rent notwithstanding that he has not paid rent for a long period. 17 O. C. 343 Foll. (*Lindsay, J. C.*) LALJI *v.* TELLA SINGH. **61 I.C. 978=8 O.L.J. 144= A.I.R. 1921 Oudh 23.**

OUDH RENT ACT (1886), S. 138—Suit for arrears.

—S. 127—Mortgagee.

———*Occupancy holding relinquished.*

Where an occupancy tenant mortgages his holding and the occupancy tenure is extinguished by virtue of relinquishment or ejectment, the interest of the mortgagee in respect of that holding also ceases from that date. His position thereafter is either that of a trespasser or that of a tenant if so recognised by the landlord. He can be treated as a tenant under S. 127. (*Wazir Hasan, Ag. C.J.*) SARFARAZ SINGH *v.* DEPUTY COMR. GONDA. **117 I.C. 475= 4 Luck. 517=7 O.W.N. 191= A.I.R. 1929 Oudh 481.**

—S. 127—Mortgagee in possession.

Failure of plaintiff (usufructuary mortgagee) to pay prior creditors as agreed does not entitle him to eject mortgagor. (*Wazir Hasan, J.C.*) AWANTIKA PRASAD SHUKEL *v.* GUR BAKSHA. **78 I.C. 804=35 I.C. 9=27 O.C. 60= 11 O.L.J. 197=5 L.R. Oudh 85= A.I.R. 1924 Oudh 425.**

—S. 127—Right to oust.

———Sir *land.*

A transferee of the three pies fractional share in *sir* land by reason of his purchase of three pies share is not justified in ousting the person who is in exclusive possession of land which has been allotted to him at a revenue partition as his *sir* : 1922 Board of Revenue Cases 147, Rel. on. (*Srivastava, J.*) MUHAMMAD YAHYA KHAN *v.* ALIA BIBI. **7 O.W.N. 75= A.I.R. 1930 Oudh 168.**

—S. 131—Possession of landlord.

Section 21 should be read with S. 131. It is not necessary for the landlord in order to comply with the provisions of Ss. 21 and 131 to obtain actual physical possession of the land. (*Raza and Srivastava, JJ.*) GOPAL DATT *v.* RAMESHWAR. **A.I.R. 1930 Oudh 422=7 O.W.N. 763.**

—S. 135—Jurisdiction.

———*Applicability of S. 17, C.P. Code.*

In all rent suits in Oudh the provisions of the Code of Civil Procedure have been made applicable provided they are not inconsistent with the provisions of the Oudh Rent Act itself. And as there is nothing in Oudh Rent Act inconsistent with S. 17, C. P. Code a rent suit which relates to different properties which are situate within the jurisdiction of different Courts can be instituted in any of such Courts. (*Wazir Hasan, Ag. C. J. and Misra, J.*) CHANNAN KUER *v.* SAHDEO SINGH. **114 I.C. 775=4 Luck. 573= 7 O.W.N. 157=A.I.R. 1929 Oudh 341.**

—S. 135—Revision.

Even where the District Judge has acted as a Rent Court, the High Court can interfere in revision under. S. 115. (*Dalal, J. C.*) JAGANNATH PERSHAD *v.* BECHU **80 I.C. 327=27 O.C. 89=11 O.L.J. 77= 5 L.R. Oudh 78=A.I.R. 1924 Oudh 349.**

—S. 138—Appeal.

———*Intervenor.*

The proviso merely deprives the decree of a Revenue Court, either original or appellate, of the effect of a final adjudication between the parties and of operating as a bar to a litigation in a civil Court. The opportunity to litigate in the Civil Court is given to all parties and not to the intervener alone. 2 O. C. 137 Foll. (*Dalal, A.J.C.*) SURAJ BAKSH SINGH *v.* MUNNULAL. **76 I.C. 763=10 O.L.J.229=26 O.C. 374= A.I.R. 1924 Oudh 52.**

—S. 138—Suit for arrears.

———Bona fide *payment to third person.*

The test of the *bona fides* of a tenant when he

OUDH RENT ACT (1886). S. 138—Third Person.

pays rent to a particular person is whether he has paid rent to him before or not. If he paid rent to a person to whom he has been paying rent hitherto, his good faith will be considered to have been established and he cannot be held to be liable to pay rent again to another person who lays claim to the said land. (*Misra, J.*) UMRAI KUER *v.* UMRAO. **118 I.C. 811 = 10 L.R.A. Rev. 198 = A.I.R. 1929 Oudh 378.**

—S. 138—Third Person.

———*Co-lambardar.*

The "third person" in the section means a person who has not the ostensible right to recover the rent and cannot include a co-lambardar, who has also a legal title to recover it. (*Dalal and Wazir Hasan, A.J.Cs.*) MAYA RAM *v.* SARJOO BRAHMAN. **87 I.C. 168 = 12 O.L.J. 185 = 2 O.W.N. 150 = 28 O.C. 389 = 8 L.R.A. Rev. 9 = A.I.R. 1925 Oudh 455.**

—S. 140—Nankar.

Where the liability for nankar or cash allowance was inseparable from the under-proprietary tenure, *i.e.*, where an under-proprietary tenant had to pay rent to his zamindar and the zamindar in his turn was liable to pay to the tenant nankar, the amount of which was only a little more than that of the rent, and when there was no exchange of nankar and rent on either side.

Held: that these facts constituted not a set-off but payment of rent, though the manner of payment was peculiar in this case. (*Wazir Hasan, J.*) GANDUPA *v.* MAHADEO BAX. **100 I.C. 788 = A.I.R. 1927 Oudh 181.**

———The decree in which the right of occupancy was conferred provided that tenant's rent was to be calculated at cultivator's rates minus the nankar.

Held: in a suit by landlord for the recovery of rent the tenant can claim to deduct the amount of nankar as the real rent is what remains after deducting the nankar payable. It is not a case of a separate amount being claimed as set-off and so is not contrary to S. 140. 17 O.C. 6, Foll. 12 O.C. 124, Dist. (*Daniels J.C.*) SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR *v.* RAM PARGAT. **89 I.C. 369 = A.I.R. 1926 Oudh 182.**

—S. 141—Contract for Interest.

A tenant cannot avoid the liability of payment of interest at the rate specified in S. 141. At the same time the landlord cannot, on his part, increase the liability by providing for a higher rate of interest by means of a private contract, and, therefore, a contract entered into between a landlord and tenant, fixing a rate of interest on arrears of rent exceeding 1 per cent. per mensem, is not legally enforceable. (*Hasan and Misra, JJ.*) ABDUL RAHMAN *v.* JAGATJIT SINGH. **97 I.C. 917 = 3 O.W.N. Sup. 153 = A.I.R. 1926 Oudh 553.**

—S. 145—Amendment of Decree.

Where a decree has been amended, time for execution runs from the date of amended decree; 33 All. 264 (P.C.), Foll. (*Wazir Hasan, J.*) NAROTAM DAS *v.* NARAIN DAS. **99 I,C. 204 = 3 O.W.N. 982 = 8 L.R.A. Rev. 24.**

—S. 145—Applicability.

Section 145 does not apply to the case of a decree against several co-sharers for an amount exceeding Rs. 500, although an individual co-sharer may not be liable for more than Rs. 500.

There is nothing in S. 145 to show that "decree" in that section means that portion of the decree for which some individual is liable. (*Pullan, J.*) ZOKAULLAH KHAN *v.* MT. GULKANDI. **104 I.C. 8 = 6 O.W.N. 1211 = A.I.R. 1927 Oudh 369.**

OUDH RENT ACT (1886). S. 154—Effect. —S. 145—Decree.

The word "decree" in the Oudh Rent Act has the same meaning as it has under the Code of Civil Procedure. A decree is a formal expression of adjudication on the whole and the Court has to look at the total amount which the decree involves, even where the decree determines liabilities of judgment-debtors *inter se* for an amount which is necessarily less than the total amount awarded.

Where a decree in a suit for profits brought under the Oudh Rent Act awarded to the plaintiff against certain defendants a sum exceeding Rs. 500 but with a liability of below Rs. 500 in respect of some defendants, *held* that execution could take place against these defendants in respect of their separate liability under the decree after the lapse of three years from the date of the decree. (*Stuart, C. J. and Wazir Hasan, J.*) ZOKAULLAH KHAN *v.* GULKANDI. **110 I.C. 115 = 3 Luck. 366 = 5 O.W.N. 23 = 10 L.R.A. Rev. 21 = A.I.R. 1928 Oudh 229.**

—S. 145—Extension of Limitation.

An application under Section 61 cannot extend the period of limitation provided for execution of a decree by Section 145. (*P. Kanhaiya Lal, J. C.*) KHUSHAL SINGH *v.* THAKUR CHANDRAPAL. **70 I.C. 966 = 25 O.C. 235 = A.I.R. 1923 Oudh 42.**

—S. 152—Effect on mortgage.

Section 152, Oudh Rent Act, provides that where a decree is for an arrear of rent due in respect of an under-proprietary right, the interest of a judgment-debtor in that right may be sold in execution of the decree. This clearly shows that if the under-proprietary holding has been mortgaged by the judgment-debtor, the only thing that can be sold is the interest of the judgment-debtor, *i.e.*, his equity of redemption. The mortgage-deed which is much anterior to the date of the passing of the rent decree against the mortgagors is valid in view of provisions of S. 153. Under the terms of S. 154 the liability of the mortgagee to pay arrears of rent due to the superior proprietor is clear, but under the correct interpretation of this section, it cannot be held that if the mortgagee does not pay the arrears of rent due from his mortgagor, his mortgage becomes invalid and the purchaser in execution sale held in execution of the rent decree can be considered to have purchased the property free of the mortgage. S. 73, T. P. Act, contemplates only those cases where in the property has been sold by the Collector necessarily free from all incumbrances for recovery of arrears of revenue or rent due, but it does not apply to the case where the property is sold not by the Collector but by the decree-holder under the provisions of S. 152, Oudh Rent Act: 9 O C. 185; 17 O.C. 379; and 4 O. L.J. 305, Rel. on. (*Gokaran Nath Misra and Srivastava JJ.*) NAROTAM DAS *v.* SUKHRAJ SINGH. **116 I.C. 49 = 5 O.W.N. 791 = 10 L.R.A. Rev. 85 = 3 Luck. 719 = A.I.R. 1928 Oudh 442.**

—S. 154—Effect.

The combined effect of S. 154, Oudh Rent Act and S. 146, C. P. Code is to render an auction-purchaser of an under-proprietary tenure in execution of a mortgage decree liable to satisfy a decree for arrears of rent obtained against the original under-proprietor. Because the provisions of S. 154, Rent Act not only make the transferee-purchaser liable for the rent subsequently accruing but they make him so liable in consequence of the act of omission to pay the rent on the part of the original under-proprietor. That being so he must be held to be a person claiming under his transferor, and, as such, the decree against the origi-

OUDH RENT ACT (1886), S. 154—Liability of transferor.

nal under-proprietor can be rightly executed against him under S. 146, C.P. Code, although he is not a judgment-debtor on the record of that decree: 9 O.C. 185, not Appr. (*Wazir Hasan and Raza, JJ.*) BISHESHAR DAYAL *v.* BAJRANG BAHADUR.

117 I.C. 452=6 O.W.N. 469= A.I.R. 1929 Oudh 353.

—S. 154—Liability of transferor.

Section 154 nowhere says that the under-proprietor shall cease to be liable for the rent. Whether he would cease to be liable or not must depend on the nature of the transfer. (9 O. C. 185 Ref.) A tenant or lessee who executes a sub-lease does not thereby become absolved from his liability to pay the rent due from him to his landlord nor is there any reason why an under-proprietor should be in different position. 26 I. A. 41, Dist. (*Daniels, A.J.C.*) COURT OF WARDS *v.* GULZARI LAL. **84 I.C. 377= 10 O.L.J. 45=26 O.C. 381=A.I.R. 1923 Oudh 175.**

—S. 156—Lease for growing grass.

———*Writing.*

When the land let is used for growing grass which is subsequently sold, the lease of such land is for agricultural purposes and so is not required to be in writing. Nor is such lease required to be registered by reason of S. 156, Oudh Rent Act: 10 O. C. 188 and 2 U. D. 510, Ref. (*Misra and Pullan, JJ.*) AMBIKA PRASAD *v.* BENI MADHO. **118 I.C. 841= 4 Luck. 649=7 O.W.N. 343=A.I.R. 1929 Oudh 529.**

OUDH SETTLED ESTATES ACT (2 of 1900) (Since repealed by 5 of 1917.)

—S. 10—Will prior to declaration.

A Will by a Talukdar, which is quite valid at the time when it is executed, cannot be considered to be operative except in so far as it conforms to the provisions of S. 18, if after the execution of the Will the Talukdar has made an irrevocable declaration under Ss. 10 and 12 of the Act in respect of the property covered by the Will. (*Gokaran Nath Misra, J.*) KRISHNA KUMARI *v.* RAJENDRA BAHADUR,

104 I.C. 155=2 Luck. 43=13 O.L.J. 546= 6 O.W.N. 1150=A.I.R. 1927 Oudh 240.

———Where a Will is executed by the holder prior to a declaration under S. 10, as soon as the declaration is made the Will relates to a "Settled Estate" and the provisions of S. 18 become applicable. (*Stuart, C.J. and Wazir Hasan, J.*) KRISHNA KUMARI DEVI *v.* RAJENDRA BAHADUR. **99 I.C. 912=2 Luck. 97= 4 O.W.N. 50=13 O.L.J. 900=A.I.R. 1927 Oudh 125.**

—S. 16—Scope of interest.

The interest of an owner of a settled estate is not strictly under the Act either an estate for life or an estate of inheritance. It is a statutory estate which in its incidents partakes of the nature of both. (*Lord Blanesburgh.*) KRISHNA KUMARI DEVI *v.* RAJENDRA BAHADUR SINHA. **116 I.C. 397=1929 A.L.J. 686= 56 I.A. 156=4 Luck. 122=30 M.L.W. 301= 6 O.W.N. 1296=A.I.R. 1929 P.C. 121= 57 M.L.J. 496 (P. C.).**

—S. 18—Daughter-in-law.

———*Stranger.*

Daughter-in-law of the Talukdar must be deemed to be a stranger within the meaning of S. 18 of Act 2 of 1900. (*Gokaran Nath Misra, J.*) KRISHNA KUMARI *v.* RAJENDRA BAHADUR. **104 I.C. 155=2 Luck. 43= 13 O.L.J. 846=A.I.R. 1927 Oudh 240.**

—S. 18—Extent of power.

Under Cl. (2) of S. 18 the extent to which the power of bequest given by law to the holder of a "settled estate" can be exercised is that he can make a bequest of the estate only to one person and to be held by him as an impartible estate and it must be made in favour of a person who is not a stranger within S. 18. He can exclude the heir-at-law by giving a life estate to a person who though not an heir-at-law is still an heir under any Clause of S. 22 of Act 1 of 1869, but beyond this he has no power to go. (*Gokaran Nath Misra, J.*) KRISHNA KUMARI *v.* RAJENDRA BAHADUR. **104 I.C. 155=2 Luck. 43= 13 O.L.J. 846=A.I.R. 1927 Oudh 240.**

—S. 18—Interpretation.

———*'Stranger'.*

The words "so as to exclude from succession any person belonging to any of the classes specified in S. 22 of the Oudh Estates Act, 1869" in the proviso to S. 18 of Act 2 of 1900 are intended to define a "stranger," and a devisee is a "stranger" if he or she has no place in the line of succession prescribed by Cls. 1 to 11 of S. 22 of the Oudh Estates Act, 1869. The intention of the proviso is not to permit an intermediate estate, however limited, between the death of the testator and the succession of the heir-at-law if the devisee of such an estate is not a person answering the description of any of the heirs specified in S. 22 of the Oudh Estates Act. A person entitled to a settled estate for life cannot constitute a stock of descent according to sub-S. (1), and the exception made in the proviso goes so far only as to allow a person to hold the estate for life under a devise if that person is not a "stranger."

The effect of S. 18 is to enlarge the "interest" of the holder of the settled estate to this extent only that he is empowered to make a devise of the whole of the estate or the profits thereof in favour of the heir and no more. (*Stuart, C.J., and Wazir Hasan, J.*) KRISHNA KUMARI DEVI *v.* RAJENDRA BAHADUR. **99 I.C. 912=2 Luck. 97=4 O.W.N. 50= 13 O.L.J. 900=A.I.R. 1927 Oudh 125.**

—S. 22—Devise to daughter-in-law.

———*Contravention of the Act.*

A talukdar of an estate, settled under the Oudh Settled Estates Act of 1900, bequeathed the same to his widow for life. He further devised it to his daughter-in-law after his widow's death for her natural life but so that she shall have no power under any circumstances by sale, alienation, mortgage or otherwise, to dispose of or incumber the whole or any portion of movable or immovable property for any period extending beyond the term of her natural life.

Held: that the devise of the estate to the daughter-in-law made by the testator was not a devise of the estate to be held by her "according to the provisions of the Act. The devise to her did not carry with it the leasing power and prevented her from becoming a fresh stock of descent and was not therefore, a devise of an estate to be held by her according to the provisions of the Act." It was a devise of a bare life-interest shorn of the incidents attached for the public benefit, to the statutory estate created by the Act and as such it was a devise prohibited by the first proviso.

Secondly the gift to her subjected the estate or the profits thereof to a demand charge or incumbrance in her favour and as such it was a gift made unlawful or ineffective by the Proviso 2 in the section. (*Lord Blanesburgh.*) KRISHNA KUMARI DEVI *v.* RAJENDRA BAHADUR SINHA. **116 I.C. 397=1929 A.L.J. 686= 56 I.A. 156=4 Luck. 122=30 M.L.W. 301= 6 O.W.N. 1296=A.I.R. 1929 P. C. 121= 57 M.L.J. 496 (P. C.)**

—S. 22—Interpretation.

———*Devise to stranger—Validity of.*

The concluding words of Proviso 3 "so as to

OUDH SUB-SETTLEMENT ACT (1866)—Shankalap koshiat.

exclude from succession any person belonging to any of the classes specified in S. 22, Oudh Estates Act 1869, are not strong enough to prevent a valid devise of the estate being made to a "stranger" in any circumstances whatever. If a testator left behind him no person belonging to any of the specified classes a devise to a stranger otherwise unimpeachable would not affect its validity. (*Lord Blanesburgh.*) KRISHNA KUMARI *v.* RAJENDRA BAHADUR SINHA. **116 I.C. 397=1929 A.L.J. 686=56 I.A. 156=4 Luck. 122=30 M.L.W. 301=6 O.W.N. 1296=A.I.R. 1929 P.C. 121=57 M.L.J. 456 (P. C.)**

OUDH SUB-SETTLEMENT ACT (26 of 1866.)

—Shankalap koshiat.

———*Under proprietary tenure—Admission,*

Where the statement of the agent of Talukdar showed that the land was held as *shankalap koshiat* rent free by the ancestors of the plaintiffs from time long before the year 1877 when a claim was made by the taluqdar for assessment of rent only and when the settlement decree therefore did not for the first time create the tenure of *shanka lap koshiat* but merely recognised it as a pre-existing tenure on the admission made by the taluqdar's agent and where the assessment of rent was made on the footing of the holding being an under-proprietary tenure, *Held* : the holding must be treated as an under-proprietary tenure. (*Wazir Hasan, A. J. C.*) B. MANOHER LAL *v.* ACHUTANAND. **74 I.C. 340=9 O.L.J. 618=A.I.R. 1923 Oudh 27.**

—S. 2—Jurisdiction of Civil Court.

Claims of the nature described in S. 2, which obviously include claims to under-proprietary titles can be entertained and decided by the Civil Courts of the Province of Oudh, the Courts of the First Regular Settlement having ceased to exist long ago: 24 O.C.342 Diss. from; 22 O. C. 201, Expl. (*Stuart, C. J. and Wazir Hasan, J.*) SHEO BAHADUR SINGH *v.* BISHUNATH. **99 I.C. 876=2 Luck. 4=4 O.W.N. 15=8 L.R.A. Rev. 48=A.I.R. 1927 Oudh 74.**

—S. 10—Burden of proof.

Under R. 10 it is necessary for the defendants to prove (1) that they have formerly been proprietors, (2) that the lands in suit had been held by them or by some persons from whom they inherited at some time since the 13th February 1844, and (3) that the lands had been held by them as sir (or nankar) when they were in proprietary possession. (*Raza and King, JJ.*) MAHMUDUL HASAN *v.* BALDEO SINGH. **100 I.C. 851=A.I.R. 1927 Oudh 183.**

OUDH TALUKDARS.

—Creation of trust.

———*Talukdar.*

Per *W. Hasan, A. J. C.*—A Talukdar possessed of the legal estates in the Talukdari property may bind himself by equitable obligations to allow beneficial interests in the same property in favour of a designated individual or in favour of a joint Hindu family of which he himself may be a member and he does so in the exercise of his power of alienation *inter vivos* or by making a testamentary disposition. (*Dalal, J. C. and Wazir Hasan, A. J. C.*) MT. INDAR KUAR *v.* MT. NAND RANI KUAR. **80 I.C. 333=10 O.L.J. 657=A.I.R. 1924 Oudh 273.**

—House, not part of taluq.

Where a house which has been consistently considered as a taluq house, though it is not actually part of the taluq property, and is also used as an office for the taluq, the house is appurtenance to the taluq : A.I.R. 1918 P.C. 25, Foll. (*Stuart, C. J. and Raza, J.*) MIRZA MAHOMED SADIQ *v.* FAKHR JAHAN BEGAM. **117 I.C. 385=3 Luck. 521=6 O.W.N. 1251=A.I.R. 1929 Oudh 97.**

—Rampur Kalan estate.

———*Government Sanad of* 25-10-1859.

The holder of the family estate known by the collective name of Rampur Kalan is subject to the Mitakshara Law. All such proprietary rights were grants from the British Government and started fresh title to the property but it does not follow that those titles were free from the personal law of the grantees as regards succession and title of heirs. 16 Cal. 397 P. C. Ref. (*Simpson and Dalal, A. J. Cs.*) RAM RATAN *v.* GANGA BAKSH. **71 I.C. 581=26 O.C. 245=10 O.L.J. 193=A.I.R. 1923 Oudh 265.**

—Sanad-Successors.

———*Meaning of.*

In an Oudh Talukdari primogeniture sanad 'successor' means those designated persons who would succeed in the event of an intestacy and not persons who take by sale, gift or bequest. (*Sir John Edge.*) MOHAMMAD ABDUL GHANI *v.* FAKHIR JAHAN BEGAM. **68 I.C. 254=49 I.A. 195=44 All.301=20 A.L.J.994=27 C.W.N. 53=31 M.L.T. 21=37 C.L.J. 1=25 O.C. 95=9 O.L.J. 339=24 Bom. L. R. 1268=A.I.R. 1922 P.C. 281=43 M.L.J. 463 (P.C.).**

———*Devisee, etc.*

A sanad granted to an Oudh Taluqdar in 1861 provided that in the event of the grantee dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture but the grantee and all his successors shall have full power to alienate the estate, either in whole or in part, by sale, mortgage, gift, bequest or adoption to whomsoever the grantee pleases.

Held, that the term 'successors' did not include persons who, being outside the line of descent, succeeded by the operation of a devise, gift or sale, etc. (*Lord Buckmaster.*) GULAM ABBAS KHAN *v.* MT. AMATUL FATIMA. **60 I.C. 937=43 All. 297=43 I.A. 135=24 O.C. 118=19 A.L.J. 433=34 C.L.J. 113=14 M.L.W. 680=1921 M.W.N. 349=8 O.L.J. 225=A.I.R. 1921 P.C. 4=40 M.L.J. 577 (P. C.)**

—Succession to non-talukdari estate.

———*Proof of.*

Non-taluqdari estate of taluqdar, entered in list 2, dying intestate will ordinarily descend to single heir by family custom—But if such custom is disproved by other side, the other side need not affirmatively prove that succession in past was governed by personal law or that a different custom exists. A.I.R. 1916 P.C. 89, Expl. (*Stuart, C.J. and Raza, J.*) MIRZA MAHOMED SADIQ *v.* FAKHR JAHAN BEGAM. **117 I.C. 385=3 Luck. 521=6 O.W.N. 1251=A.I.R. 1929 Oudh 97.**

—Transfer by Talukdar.

A Talukdar could not make any transfer prior to the letter of grace and restoration of 19th October 1859. A Talukdar was not invested with proprietary title until that letter was issued and there could be no transfer of title prior to that date by a person with whom the Summary Settlement was made. (*Dalal, J.C. and Wazir Hasan, A.J.C.*) MT. INDAR KUAR *v.* MT. NAND RANI KUAR. **80 I.C. 333=10 O.L.J. 657=A.I.R. 1924 Oudh 273.**

OUSTER.

See ADVERSE POSSESSION.

OUTCASTE.

See (1) CASTE DISABILITIES REMOVAL ACT.
(2) HINDU LAW—(*a*) CONVERSION.
(*b*) MARRIAGE.
(*c*) SUCCESSION, ETC.

OWNERSHIP—Indication of ownership.

OWNERSHIP.

—Indication of ownership.

———*Repair of tank.*

Fact that some persons are to effect repairs of a tank is no indication as to its ownership.

The mere fact that certain persons in connexion with certain tenures of land are under an obligation to repair a particular tank is no indication whatever as to the ownership of the tank itself or of the property in the water in the tank. The general presumption being that all the general tanks within the ambit of the shrotriem belong to the shrotriemdar, it follows that unless and until the presumption is rebutted by very clear and cogent evidence the presumption should be given effect to. (*Srinivasa Aiyangar, J.*) G. P. VENKATAYYA *v.* K. KISTAPPA. **111 I.C. 743= A.I.R. 1928 Mad. 340.**

PAKKA ADATIA—

See also CONTRACT ACT, Ss. 30, 182-238.

--Calling for margin.

———Onus *as to proof of circumstances.*

In accordance with the ordinary practice in Bombay, the pakka adatias would be entitled to call for margin, if the rise or fall in the market justified a demand for margin. But the *onus* clearly lies on them to establish that circumstances arose which justified the exercise of their powers. Even where the contract purports to give an agent an absolute discretion as to calling for margin, it is yet incumbent on him to show that circumstances exist for the reasonable exercise of that discretion. A.I.R. 1925 P.C. 510, Foll. (*Marten, C.J. and Blackwell, J.*) DEVSHI HARPAL *v.* BHIKAM CHAND·RAMCHAND. **100 I.C. 993=29 Bom.L.R. 147= A.I.R. 1927 Bom. 125.**

—Liability of adatia.

The position of a pakka adatia is analogous to that of *del credere* agent, who incurs only a secondary liability towards the principal. His legal position is partly that of an insurer and partly that of a surety for the parties with whom he deals to the extent of any default by reason of any insolvency or something equivalent. His liability does not go to the extent of making him responsible to the principal where there can be no profit by reason of any stringency in the market. (*Iqbal Ahmed and Sen, JJ.*) CHAMPA RAM *v* TULSHI RAMI JAN LAL. **105 I.C. 739= 26 A.L.J. 81=A.I.R. 1927 All. 617.**

—Relation.

Relationship between *pakka adatias* and their constituents is not one of principal and agent, but of principal and principal. (*Kotwal, A.J.C.*) HARANARAYAN JODHARAJ *v.* RADHA KISAN. **75 I.C. 906= A.I.R. 1923 Nag. 324.**

PAPER CURRENCY ACT (2 OF 1910).

(Since Repealed by 10 of 1923).

—S. 26—Admissibility in evidence.

Though Pro-notes if made payable to bearer on demand are not enforceable in law, if the real consideration for the hypothecation bonds is the defendant's indebtedness ascertained upon settlement of accounts, of which the promissory notes are evidence the liability for the debts will remain even if the notes are unenforceable. But they are not inadmissible in evidence as acknowledgments like unregistered documents under Section 49 of the Indian Registration Act or unstamped documents under Section 34 of the Indian Stamp Act. (*Spencer and Devadoss, JJ.*) NATARAJULU NAICKER *v.* SUBRAMANIAN CHETTIAR. **69 I.C. 939=45 Mad 778= 1922 W.N. 450=16 M.L.W. 705= A.I.R. 1922 Mad. 181=43 M.L.J. 695.**

PARDANASHIN LADY—Appointment as guardian.

—S. 26—Banker, who is.

———*Endorser of a Hundi.*

It cannot be said that the endorser ought to be treated as a banker, merely on the ground that a hundi was drawn on him and he endorsed it to somebody else. (*Abdur Rahim and Oldfield, JJ.*) ALAGAPPA CHETTY *v.* ALAGAPPA CHETTY. **60 I.C. 130= 44 Mad. 187=A.I.R. 1921 Mad. 382.**

PAPER CURRENCY ACT (10 OF 1923).

—S.25—Basis of suit.

———*Independent obligation—Admissibility.*

A promissory note made payable to bearer on demand offends against the provisions of S. 25 Paper Currency Act, and is therefore void and cannot be the basis of a claim in any Court of law. But the creditor can sue on the basis of any obligation independently of the execution of the promissory note. (1914) 2 U.B. R. 13; 40 Mad. 727; 40 Mad. 585; 6 M.L.W. 630 and A.I.R. 1922 Mad. 181; Rel. on: and if there is other evidence outside the promissory note of the obligation sued upon, the promissory note in question is admissible as evidence to be read in conjunction with that other evidence to arrive at a decision as to whether the independent obligation is proved. Where there is no other evidence, while the promissory note is still admissible in evidence, there can be no decree on the basis of it alone: 6 M.L.W. 630 and A.I.R. 1922 Mad. 181, Rel. on. (*Boys, Kendall and Sen, JJ.*) IN THE MATTER OF S. 25, PAPER CURRENCY ACT (10 of 1923) **115 I.C. 630=50 All. 839=26 A.L.J 729= A.I.R. 1928 All. 371 (S. B.)**

—S. 25—Hundi.

A Hundi, payable to bearer one day after sight, does not contravene the provisions of S. 25. (*Heald and Cunliffe, JJ*). SWEE LEONG AND COMPANY *v.* A. T. CHETTYAR FIRM. **101 I.C. 641= 6 Bur. L.J. 47=A.I.R. 1927 Rang. 159.**

—S. 25—Test.

The test to decide whether a pronote offends against provisions of S. 25 is whether promissory note is payable to any person who may be in possession and whether the bearer of the note without any endorsement has a right to be paid the money due on the note.

In addition to the words "on demand by lender" if the words "or to whomsoever the lender may order" in a promissory note are used, the nature of the promissory note does not change nor does it offend against the provisions of S. 25, Paper Currency Act : 16 Bom. 689, Foll.; 40 Mad. 585, Dist. (*Dalal, J.*) AJODHYA PRASAD *v.* RIKHNATH. **114 I.C. 190=50 All. 764= 26 A.L.J. 535=A.I.R. 1928 All. 305.**

PARDANASHIN LADY.

See also (1) CONTRACT ACT, S. 16.
(2) EVIDENCE ACT, S. 111.

Appointment as guardian.
Burden of proof.
Compromise and award.
Definition.
Guiding principles.
Independent advice.
Knowledge and understanding.
Right to privileges.
Miscellaneous.

—Appointment as guardian.

A *pardanashin* lady does not disqualify herself from being appointed guardian of minor's property : but the Court will see whether she will be the proper guardian looking to the nature of the business.

PARDANASHIN LADY—Burden of proof.

(*Kotval, A. J. C.*) MT. RAJARANI *v.* BHAGWANDAS **69 I.C. 596=A.I.R. 1922 Nag. 232.**

—Burden of proof.

———*Proof of covenant in the deed.*

Where a document purporting to transfer property is executed by a pardanashin lady, if the transferee depends upon a specific covenant entered in it to establish his title to it, the burden of proof lies heavily on him to prove that the document was read over and explained to her and that she understood it. But in other cases, the presumption under S. 55 overrides this burden : 34 All. 455 (P. C.) Ref. (*Sulaiman and Kendall, JJ.*) MUHAMMAD SIDDIQ *v.* MUHAMMAD NUH. **A.I.R. 1930 All. 771.**

———The burden lies on the person relying upon a deed executed by a pardanashin lady to show to the satisfaction of the Court that not only the nature of the transaction but its legal effect was fully understood by her. (*Sulaiman and Kendall, JJ.*) PARAS RAM *v.* MEWA KUNWAR. **1930 A.L.J. 890= A.I.R. 1930 All. 561,**

———*Inadequate.*

Where there was no positive evidence to show that the sale-deed was actually read over to the executants, namely, pardanashin ladies and explained to them, but, on the other hand, there was definite evidence to the effect that the deed was never read over to them and there was the additional fact that the deed was not presented for registration by the executants themselves so that there was not even an endorsement by the Sub-Registrar that the document was read over and explained to them, *Held*, that under those circumstances the plaintiff had failed to discharge the initial burden which lay upon him to show that the deed was read over, explained to and understood by the ladies so as to bind them. (*Sulaiman, J.*) MAHOMMED SIDDIQ *v.* MUHAMMAD NUR . **124 I.C. 185=1930 A.L.J. 653.**

———*Explanation of the deed.*

Although in the case of a transaction entered into by a pardanashin lady the *onus* is always on the person relying on the transaction to show that it was not only the deed of the pardanashin lady but that she understood the transaction which she was entering into, it is not necessary in every case that the person relying on the transaction should show affirmatively that the deed was explained to her. Whether it should be so shown or not depends upon the circumstances of each case : A. I. R. 1927 P. C. 84; A. I, R. 1925 P. C. 204 and A. I. R. 1928 P. C. 308, Rel. on. (*Wort and James, JJ.*) MUHAMMAD SADIK KHAN *v.* MASIHAN BIBI. **125 I.C. 158=9 Pat. 417=11 P.L.T. 439= A.I.R. 1930 Pat. 452.**

———Where a deed has been executed by a pardanashin lady in the seclusion of the zenana at a time when she was in a delicate condition and had no independent advice and the promisee was her husband who was naturally in a position to dominate her will, it is settled law that the *onus* of proving that the transaction evidenced by the deed had been effected without coercion or undue influence lies upon those who support, and not on those who attack, the transaction, (*Tek Chand and Hilton, JJ.*) MT. BASHARAT SULTAN BEGAM *v.* MT. NAZIR JAHAN. **121 I.C. 184=31 Punj. L.R. 265.**

———Regarding a deed executed by a pardanashin lady, the *onus* is on the person who claims under the deed to prove that the deed was explained to the lady either before execution or after it under circumstances which established the execution or adoption of it by her with full knowledge and comprehension. (*Rupchand Bilaram, A. J. C.*) VISHINDAS FATEHCHAND *v.* BASSARMAL LALCHAND. **121 I.C. 869.(Sind.)**

PARDANASHIN LADY—Burden of proof.

———*Illiterate lady.*

It is undisputed that in the case of a disposition of property by a pardanashin lady an *onus* is cast on the person relying on the disposition to establish that the transaction is one which the disponent thoroughly comprehended and deliberately and of her own free will carried out, and where the pardanashin lady is illiterate, the Court will be especially alert to see that the burden cast on those supporting her dispositions is satisfactorily discharged. (*Lord Atkin.*) RUHULLA *v.* HUSSUNALLI. **110 I.C. 260=32 C.W.N. 929= 28 M.L.W. 595=48 C.L.J. 412=5 O.W.N. 1138= A.I.R. 1928 P.C. 303=55 M.L.J. 84. (P. C.)**

—In dealing with sales or gifts or agreements to refer a dispute to arbitration by pardanashin ladies, the strongest and most satisfactory proof ought to be given by the person who claims under that sale, gift or agreement from them, that the transaction was a real and *bona fide* one fully understood by the lady whose property is dealt with. In order to enable a person to claim property under such an agreement successfully, proof of mere mechanical execution of the agreement is not sufficient but its intelligent execution must be proved. 18 Cal. 545 (P.C.): 34 All. 455; and A. I. R. 1925 P. C. 204; Rel. on; 36 All. 81 (P.C.) and A. I. R. 1919 P. C. 24 Dist. (*Gokaran Nath Misra and Nanavutty, JJ.*) SHAH MD. JAMIL ATA *v.* SHAH MD. HAFIZ ATA, **112 I.C. 522= 5 O. W. N. 847=A.I.R. 1928 Oudh 449.**

———The principle that those who rely upon deeds and powers executed by a pardanashin lady should satisfy the Court that they had been explained to and were understood by her applies to agreements to compromise litigation, though it may be sufficient in such a case to show that the general result of the compromise, as distinct from the details, and legal technicalties involved were understood by her and that disinterested and competent persons with a fair understanding of the whole matter advised her to execute it. A. I. R. 1923 P. C. 13 Foll. (*Newbould and Graham, JJ.*) ANANDA PRIYA *v.* BIJOY KRISHNA. **91 I.C. 705=A.I.R. 1926 Cal. 643.**

———*Formal reading out when dispensed with.*

It is not essential in every case that a pardanashin lady should have independent advice. It is true that any person taking a conveyance from a pardanashin lady must prove that the document was explained to her, that she understood what she was doing and that she had independent advice but where it is established that the lady knew what the nature of the document was that she was executing and that she had independent advice, it is not necessary to prove the formal reading over or explanation of the document. (*Walmsley and B. B. Ghose, JJ.*) RAKHAL CHANDRA BARDHAN *v.* PROSAD CHANDRA CHATTERJI. **90 I.C. 229=A.I.R. 1926 Cal. 73.**

———Party relying on a deed executed by a pardanashin lady must prove that it was the free and intelligent act of the lady for that she adopted it with full knowledge and comprehension; A. I. R. 1925 P. C. 204, Foll. (*Hallifax and Kotwal, A.J.Cs.*) MIR DILWAR ALI *v.* RABIA BEGAM. **95 I.C. 506= A.I.R. 1926 Nag. 414.**

———*Explanation of the deed.*

Persons seeking to charge with liability under a deed pardanashin ladies have to prove not merely that they executed the document sued upon, but also that they understood and appreciated the nature of the transaction which they were purporting to enter into; but it is not necessary in all cases to show that at the time when the document was executed the explanation was then given. Although it is usual and

PARDANASHIN LADY—Burden of proof.

necessary that it should be read over to her at that time, it is certainly unnecessary that it should be explained to her when she is already well aware of the nature of the document. (*Dawson Miller, C. J. and Foster, J.*) THIRATHMAN JHA *v.* MT. GUNJESWARI KUER. **96 I.C. 571=8 P.L.T. 17= A. I. R. 1926 Pat. 529.**

——*Mere admission of execution.*

Where the defendant mortgagor was an illiterate pardanashin lady;

Held: that the mere admission of her execution of the document is not sufficient to dispense with the necessity of proving the passing of consideration. (*Das and Ross, JJ.*) RAM LAL SINGH *v.* MT. SEPTI. **94 I.C. 558=1926 P. H. C. C. 117= A. I. R. 1926 Pat. 295.**

——The parties to prove the state of the seller's mind are the parties who set up and rely on the deed. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension. 7 Cal. 245; 29 Cal. 664 and 34 All. 455, Foll. (*Lord Sumner*). FARIDUN-NISA *v.* MUKHTAR AHMED. **89 I. C. 64[illegible]= 47 All. 703=28 O.C. 338=52 I.A. 342= 23 A.L.J. 1000=42 C.L.J. 531= 1925 M.W.N. 918=12 O.L.J. 656= 28 Bom.L.R. 193=30 C.W.N. 337= 2 O. W. N. 662=A. I. R. 1925 P. C. 204= 49 M. L. J. 758 (P. C.)**

——*Rigour varies.*

Where a Pardanashin lady is concerned, the burden of proof rests upon him who would seek to take advantage of a document executed by her. It is for him to show that the lady comprehended thoroughly and deliberately and of her own free will carried out the deed. But this rule has to be followed intelligently. The Court will gauge the burden of the proof, which the plaintiff has to discharge, on a careful consideration whether the document by which he seems to profit was or was not injurious to the Pardanashin lady who executed it. (*Shah, Ag. C. J. and Kincaid, J.*) HASSANALLI DEGUONIYA *v.* RUHULLA HAMAD. **86 I. C. 886=27 Bom. L. R. 184= A. I. R. 1925 Bom. 305.**

——*Acts of Agents.*

Any person seeking to bind a purdanashin lady by the act of her agent must give strict proof of such agency. 17 W. R. 393, P. C. Foll. (*Walmsley and B. B. Ghose, JJ.*) SRIMATI TARU BALA DASSI *v.* SOURENDRA NATH MITRA. **88 I. C. 369=29 C. W. N. 597= 41 C. L. J. 213=A. I. R. 1925 Cal. 866.**

——In a suit by a pardanashin lady to cancel a deed executed by her the defendant must prove not only that the deed was explained to her, but also that she really understood all the provisions of the deed.

Where the deed purported to create a trust with the defendant who had great influence on her as trustee and where one of its clauses was to the effect that even during her lifetime she should be divested of her ownership of the property, but should be entitled only to get some maintenance from the trustee and where the defendant failed to prove that she had really understood and consented to this clause.

Held: the deed should be set aside. (*Sanderson, C. J. and Walmsley, J.*) BHOLA NATH SEAL *v.* BHUTHONATH SEN. **84 I. C. 490= [illegible] C. L. J. 393=A. I. R. 1925 Cal. 239.**

——*Rigour relaxed in cases of non-purda ladies apply where the lady is not incapable of understanding business.*

PARDANASHIN LADY—Burden of proof.

The general rule that the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from a pardanashin lady that the transaction was real and *bona fide* one, and fully understood by the lady whose property is dealt with does not apply where the lady though described as a pardha lady of rank does not observe pardha within the strict meaning of the term, is accustomed to transact business, is capable of carrying out monetary transactions and has no hesitation in appearing even before comparative strangers. (*Scott-Smith and Fforde, JJ.*) SRI RAM *v.* NAND KISHORE. **85 I. C. 169=5 Lah. 465= A. I. R. 1925 Lah. 196.**

——Where the agent of a pardanashin lady, holding a power of attorney from her authorising him to mortgage her property, mortgages the same, the mortgagee need not prove that the consideration reached the lady. 4 O.L.J. 299, Dist. (*Dalal, J.C. and Gokaran Nath Misra, A.J.C.*) BIBI BATUL, *v.* KEDAR NATH. **88 I.C. 810=12 O.L.J. 372= A.I.R. 1925 Oudh 462.**

——*Evidence Act, S. 111.*

Where a pardanashin lady was possessed of considerable property which she inherited from her father but which was entirely managed by her husband who used to receive and spend the entire income without reaching the lady's hands and whom she used to obey implicitly,

Held: her husband should be deemed to have stood in a position of active confidence to her. The provisions of S. 111 of the Evidence Act, 1872, applied to the case and the burden of proving good faith lay on the party stating that the transaction into which she had been led by her husband was free from undue influence. The question for determination in the case was not merely that the lady knew what she was doing or had done but a still further vital question to be determined was how her intention to execute the mortgage was produced and whether all that care and prudence was placed round her as against those who advised her, which from their situation and relation with respect to her they were bound to exert on her behalf. (*Wazir Hasan and Neave, A.J.Cs.*) DWARKA PRASAD *v.* NASIR AHMAD, **78 I.C. 850=11 O.L.J. 219= A.I.R. 1925 Oudh 16.**

——According to the principles which have always guided the Courts in dealing with sales or gifts made by pardanashin ladies, the strongest and most satisfactory proof ought to be given by the person, who claims a sale or gift from them, that the transaction was a real and *bona fide* one and was fully understood by the lady whose property is dealt with. Owing to the secluded life pardanashin ladies live and the consequent inexperience in the conduct of business, legal or other, the law throws its protection around them. (*Lord Atkinson,*) SARATHKUMARI *v.* AMULYADHAN. **71 I.C. 632=17 M.L.W. 481= 27 C.W.N. 629=25 Bom. L.R. 548= 37 C. L.J. 501=1923 M.W.N. 392= 32 M.L.T. 137=A.I.R. 1923 P. C. 13.(P. C.)**

——*Principles.*

Every person taking a document from a pardanashin lady is bound to show affirmatively that the document was her document, that is to say, that she understood the nature of the transaction and the effect of it. The Courts of law have laid down certain rules for assisting them to determine the point, but it is necessary to remember that the rules so laid down are rules of prudence rather than rules of law, and that their application will depend on the particular

PARDANASHIN LADY—Burden of proof.

facts of each case. Execution, full knowledge of the nature and effect of the transaction, and independent and disinterested advice must be proved to justify the alienation by the lady. Decisions will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of a personal confidence and secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. The Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate, to have possessed the capacity to judge for herself.

Independent advice is necessary even in cases of alienation for religious purposes.

If upon a review of the facts which include the nature of thing done and the training and habit of the mind of the grantor, as well as the proximate circumstances affecting the execution, the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand. (*Das and Kulwant Sahay, JJ.*) MANSINGH *v.* NAWALAKH DATI. **73 I.C. 822=2 Pat. 607=4 P.L.T. 335=A.I.R. 1923 Pat. 492.**

———*Gift.*

The strongest and most satisfactory proof must be given by the donee of the entire property of a Pardanashin lady, that the gift was a real and *bona fide* one and fully understood by the lady. (*Lord Shaw.*) KAMAWATI *v.* DIGBIJAI SINGH. **64 I. C. 559=30 M.L.T. (P.C.) 47=1922 M. W.N. 336=15 M. L. W. 1=26 C.W.N. 490=24 Bom. L.R. 626=48 I.A. 381=43 All. 525=A.I.R. 1922 P.C. 14=42 M.L.J. 87 (P.C.).**

———*Transaction along with husband.*

Where the husband of a *pardanashin* lady having entered into an agreement obtains his wife's consent and signature afterwards, the law which throws on the parties dealing with such women, the *onus probandi* of their understanding the contents, has no application. (*Madgavkar, A. J. C.*) KHEMCHAND RATAMCHAND. *v.* DHALIMAL. **67 I. C. 19=15 S. L. R. 180=A.I.R. 1922 Sind 33.**

———*Independent advice.*

The circumstances, under which a pardanashin woman agrees to sell or mortgage property in which she is interested, must be carefully examined in order to ascertain that she had independent advice and that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed, and that there was no undue influence or misrepresentation. (*Sir John Edge.*) MATI LAL DAS *v.* EASTERN MORTGAGE AGENCY. **61 I.C. 486=47 I.A. 265=28 M.L.T. 351=1920 M.W.N. 631=25 C.W.N. 265=A.I.R. 1921 P. C. 118 (P.C.).**

———In the case of a deed executed by a pardanashin lady the law protects her by demanding that the burden of proof shall in such case rest not with those who attack, but with those who rely upon the deed and it must be proved affirmatively and conclusively that the deed was not only executed by, but was explained to and really understood by the grantor. It must also be established that it was not signed under

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duress but by the free and independent exercise of her will, 36 All. 81 (P. C.) and 29 Cal. 749 (P. C.) Foll. (*Kincaid, J. C. and Raymond, A. J. C.*) MT. BHAGHURI *v.* MT. KHATUMAL. **80 I.C. 118=16 S.L.R. 25=A.I.R. 1921 Sind. 177.**

—Compromise and award.

———*Authority to compromise given to Advocate—Knowledge of.*

Where a pardanashin lady is kept fully informed throughout of all the various stages of the negotiations of compromise and is fully and intelligently aware that the advocate engaged is clothed with authority to compromise the suit on her behalf and is in fact exercising his authority, it cannot be said that the lady had not been proved to have authorised the agreement. A.I.R. 1925 Cal. 866, Reversed. (*Lord Atkin*). SOURENDRA NATH MITRA *v*, TARUBALA DASI. **123 I.C. 545=34 C.W.N. 453=1930 A.L.J.489=32 Bom.L.R. 645=51 C.L.J. 309=A.I.R. 1930 P.C. 158=58 M.L.J. 551 (P.C.).**

———*Agreement not explained.*

Where there is no satisfactory evidence to show that the agreement of reference to arbitration was fully explained to pardanashin ladies and they appreciated the legal consequences of the reference, the arbitration award though a registered document does not bind them. (*Sulaiman and Pullan, JJ.*) BENI DIN *v.* RAM NARESH. **121 I.C. 99=A.I.R. 1929 All. 824.**

———The principle that those who rely upon deeds and powers executed by a pardanashin lady should satisfy the Court that they had been explained to and were understood by her, applies to agreements to compromise litigation, though it may be sufficient in such a case to show that the general result of the compromise, as distinct from the details, and legal technicalities involved were understood by her and that disinterested and competent persons with a fair understanding of the whole matter advised her to execute it. A.I.R. 1923 P.C. 13, Foll. (*Newbould and Graham, JJ.*) ANANDA PRIYA *v.* BIJOY KRISHNA. **91 I.C. 705=A.I.R. 1926 Cal. 643.**

———*Sufficient proof.*

In order to prove that at compromise executed by her is binding upon a pardanashin lady it is sufficient that the general result of the compromise should be understood, and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise the lady that the deed should be executed; 47 Cal. 175 (P. C.) Foll. (*Stuart, C. J. and Hasan, J.*) DHIRAJ KUNWAR *v.* CHANDRIKA PRASAD. **91 I.C. 1050=13 O.L.J. 210.**

———*Financier.*

It would be disastrous to the interests of Purdanashin ladies to hold that a financier is authorised on behalf of a purdanashin lady whose litigation he is looking after, to compromise a suit on any terms he thinks fit and thereby bind the lady. (*Walmsley and B. B. Ghose, JJ.*) SRIMATI TARU BALA DASI *v.* SOURENDRA NATH MITRA. **88 I.C. 369=29 C.W.N. 597=41 C.L.J. 213=A.I.R. 1925 Cal. 866.**

—Definition.

———A pardanashin is a "woman of rank" who lives in seclusion, shut in the "zenana," having "no communication except from behind the parda, or screen with any male persons save a few privileged relations or dependants": 34 All. 455 (P.C.); A.I.R. 1922 P. C. 14; 28 C.L.J. 306; 11 M.I.A. 551; A.I.R. 1922 Cal. 203, Foll.

A woman belonging to a family of barbers, keeping a hamam in the town of Delhi, whose females did not live in a state of seclusion is not pardanashin,

PARDANASHIN LADY—Guiding principles.

(*Addison and Tekchand, JJ.*) FAYYAZ-UD-DIN *v.* KUTB-UD-DIN. **116 I.C. 809=10 Lah. 761=30 P.L.R. 288=A.I.R. 1929 Lah. 309.**

—Guiding principles.

While it is important to maintain the principles of law laid down for the protection of pardanashin ladies it is also important not to "transmute such a legal protection into a legal disability." (*Lord Atkin.*) RUHULLA *v.* HARSUNALLI. **110 I.C. 260=32 C.W.N. 929=28 M.L.W. 595=48 C.L.J. 412=5 O.W.N. 1138=A.I.R. 1928 P.C. 303=55 M.L.J. 84 (P.C.)**

——*Circumstances to be taken into account.*

The mere declaration by the transferor, a pardanashin lady, subsequently made, that she had not understood what she was doing, obviously is not in itself conclusive. It must be a question, whether, having regard to the proved personality of the transferor, the nature of the transfer, the circumstances under which it was made, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the *onus* which rests on them. Of course, fraud, duress and actual undue influence are separate matters: A.I.R. 1925 P.C. 204, Ref. (*Sir John Wallis.*) BARKATUNNISSA BEGUM *v.* DEBI BAKSH. **101 I.C. 29=25 A.L.J. 314=1927 M.W.N. 381=31 C.W.N. 693=4 O.W.N. 523=8 P.L.T. 480=26 M.L.W. 147=A.I.R. 1927 P.C. 84 (P.C.).**

——Wakf *deed executed* by Pardanashin *lady—Independent advice is not essential—But disposition made must be substantially understood—Data for testing if executant really understood her act, discussed.*

The law of India contains well-known principles for the protection of persons, who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind. That the instrument in question in a particular instance is a *wakfnama* makes no difference. Independent legal advice is not in itself essential. 36 All. 81 Foll.

The real point is that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it. 18 Cal. 545 and 46 I.A. 272 Foll.

The parties to prove the state of the seller's mind are the parties who set up and rely on the deed. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension. 7 Cal. 245; 29 Cal. 664 and 34 All. 455 Foll.

Further, the whole doctrine involves the view that mere execution by such a person, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant. Evidence to establish such comprehension is most obviously found in proof that the deed was

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read over to the settlor and, where necessary, explained. If it is in a language which she does not understand, it must, of course, be translated, and it is to be remembered that the clearness of the meaning of the deed will suffer in the process. The extent and character of the explanation required must depend on the circumstances of each case. Length, intricacy, the number and complexity of the dispositions, or the unfamiliarity of the subject-matter are all reasons for requiring an increased amount and efficiency of explanation. Thus a matter not likely to attract the attention of the executant in itself ought not to be relied on as binding, unless her attention has been directly drawn to it. 29 I.A. 137 Foll.

So if the deed, as presented for execution, differs substantially, either by way of addition or of omission, from the scheme and details which the intending settlor has previously laid down, the discrepancy ought to be clearly pointed out and its nature and effect should be fully described, unless, which must be rare, the difference is so obvious that even a person in the settlor's position must perceive and appreciate it for herself. If the description and explanation have been partial or erroneous, or have not been given at all, the question will then arise, as it arises where there has been no independent legal advice, whether, if proper information, had been given, it would have affected the mind of the executant in completing the deed. On the other hand, the doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the settlor, subsequently made, that she had not understood what she was doing is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the *onus* which rest upon them. Of course fraud, duress and actual undue influence are separate matters. (*Lord Sumner.*) FARID-UN-NISA *v.* MUKHTAR AHMAD. **89 I.C 649=47 All. 703=28 O.C. 338=52 I.A. 342=23 A.L.J. 1000=42 C.L.J. 531=1925 M.W.N. 918=12 O.L.J. 656=28 Bom.L.R. 193=30 C.W.N. 337=2 O.W.N. 662=A.I.R. 1925 P.C. 204=49 M.L.J. 758 (P.C.).**

——The Court, when called upon to deal with a deed executed by a pardanashin lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter. The leading judicial decisions which recognise these principles fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady in the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved extrinsically.

The fairness of the bargain is the crucial test. The Court must have regard to the intellectual attainments

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of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself. But these are only general principles, and there is a grave risk of failure of justice if they are moulded into inelastic formulas or crystallised into inflexible rules, and treated as of universal application regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication. (*Mookerjee and Buckland, JJ.*) KRISHNA KISOR *v.* NAGENDRABALA. **66 I.C. 694=34 C.L.J. 33=25 C.W.N. 942=A.I.R. 1921 Cal. 435.**

———The Court, when called upon to deal with a deed executed by a pardanashin lady, must satisfy itself upon the evidence first that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do ; secondly that she had full knowledge of the nature and effect of the transaction into which she is said to have entered ; and thirdly, that she had independent and disinterested advice in the matter. The decisions relating to the subject fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence ; and secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted ; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically.

The essence of the matter is that the circumstances under which a purdanashin woman agrees to transfer property in which she is interested must be carefully examined, in order to ascertain that she had independent advice and that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed and that there was no undue influence or misrepresentation. The Court must thus have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself. *Case-law extensively referred to.*

These, however, are only general principles and it cannot be too strongly emphasised that there is a grave risk of failure of justice, if they are moulded into inelastic formulas or crystallised into inflexible rules and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication. Although independent and competent advice does not mean independent and competent approval, yet signifies, at any rate, advice removed entirely from the suspected atmosphere and conveyed in the clear language of an independent mind, free from taint of interests, to the party acting, regarding the precise nature and consequences of the transaction. There need not necessarily be misrepresentation by one party to the other to invalidate the deed; if there is any concealment of material fact, any failure to disclose material information or any just suspicion of artifice, the Court will interpose and pronounce the transaction void, and will, as far as possible, restore the parties, to their original rights because equity demands in such circumstances the most abundant good faith in the transaction between the parties. (*Mookerjee and Panton, JJ.*) NIBARAN CHANDRA *v.* NIRUPAMA DEBI. **69 I.C. 476=34 C.L.J. 563=26 C.W.N. 517=A.I.R. 1921 Cal. 131.**

PARDANASHIN LADY—Independent advice.

—Independent advice.

Independent advice in the case of pardanashin ladies is not absolutely necessary : 36 All. 81 (P.C.) and A.I.R. 1925 P.C. 204, Foll. (*Sulaiman and Kendall, JJ.*) PARAS RAM *v.* MEWA KUNWAR. **1930 A.L.J. 890=A.I.R. 1930 All. 561.**

———Transactions by pardanashin donor cannot be set aside simply because it has not been proved that the donor had independent advice at the time of executing the document. The possession or absence of independent advice is a fact to be taken into consideration and well weighed on a review of the whole of the circumstances relevant to the issue of whether the grantor thoroughly comprehended and deliberately and of her own free will carried out the transaction, and if upon such a review of the facts—which include the nature of the things done, and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution—the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand": 36 All. 81 (P. C.) Foll. (*Addison and Tek Chand, JJ.*) FAYYAZ-UD-DIN *v.* KUTB-UD-DIN. **116 I.C. 899=10 Lah. 761=30 P.L.R. 288=A.I.R. 1929 Lah. 309.**

———In the case of transactions with pardanashin woman the question of independent advice is not one of vital importance because the advice if given might have been bad advice or the settlor might have insisted on disregarding it. The real point is that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it and there is a further danger that if this necessity for independent advice is carried too far the legal protection given to the pardanashin lady may be actually transmuted into a legal disability : A.I.R. 1925 P.C. 204, Foll ; 36 All. 81 (P. C.) Ref. (*Raza and Pullan, JJ.*) HANUMAN SAHU *v.* ABBAS BANDI BIBI. **120 I.C. 387=6 O.W.N. 169=4 Luck. 452=A. I. R. 1929 Oudh 193.**

———*Formal reading of contents.*

It is not essential in every case that a pardanashin lady should have independent advice. It is true that any person taking a conveyance from a pardanashin lady must prove that the document was explained to her, that she understood what she was doing and that she had independent advice but where it is established that the lady knew what the nature of the document was that she was executing and that she had independent advice, it is not necessary to prove the formal reading over or explanation of the document. (*Walmsley and B. B. Ghose, JJ.*) RAHAL CHANDRA BARDHAN *v.* PROSAD CHANDRA CHATTERJI. **90 I.C. 229=A.I.R. 1926 Cal. 73.**

———Want of independent advice will not make document invalid unless such advice would have affected the execution. 46 I.A. 272 (P.C.) and A.I.R. 1922 Cal. 203, Rel. on. (*Jwala Prasad and Bucknill, JJ.*) RAM SUMRAN PRASAD *v.* GOVIND DAS. **99 I.C. 782=5 Pat. 646=1 P.L.T. 821=A.I.R. 1926 Pat. 582.**

———*Question of fact.*

Inability to prove that the lady had independent advice is not of itself fatal to the validity of the deed. The legal protection which the law gives to a pardanashin lady cannot be transmuted into a legal disability. It is a question of fact in each case whether the obtaining of independent advice would really have made any difference to the executant. If upon a re-

PARDANASHIN LADY—Independent advice.
view of the facts, which include the nature of the thing done and the training and habit of mind of the grantor as well as the proximate circumstances affecting the execution, the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, the deed ought to stand. (*Das and Adami, JJ.*) MT. HIRA BIBI *v.* RAMDHAN LAL. **62 I.C. 540=1922 P.H.C.C. 42=6 P.L.J. 465=2 P.L.T. 752=A.I.R. 1922 Pat. 70.**

———The circumstances, under which a pardanashin woman agrees to sell or mortgage property in which she is interested, must be carefully examined in order to ascertain that she had independent advice and that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed, and that there was no undue influence or misrepresentation. (*Sir John Edge.*) MATI LAL DAS *v.* EASTERN MORTGAGE AGENCY CO. LTD. **61 I.C. 486=47 I.A. 265=28 M.L.T. 351=1920 M.W.N. 631=25 C.W.N. 265=A.I.R. 1921 P.C. 118 (P.C.).**

———*Hindu widow.*

Where a Hindu widow, a *Pardanashin* lady, incurs a debt, the necessity for which is proved, and the creditor has made due enquiries he need not show that the lady had independent advice. (*Das and Adami, JJ.*) RADHA KISHEN *v.* JAG SAHU. **60 I.C. 173=3 U.P.L.R. (Pat.) 14.**

—Knowledge and understanding.

———*Inducement to sell on the strength of an illegal forfeiture clause—Vendee cannot plead illegality.*

Where the executant is a pardanashin and uneducated lady and she is made to agree to sell her property on the understanding that a forfeiture clause will be operative in her favour and it is not explained to her that such a forfeiture was illegal and unenforceable, then if the defendant wishes to stick to the transaction he cannot be allowed to repudiate the forfeiture clause on the strength of which the executant's consent had been obtained. (*Sulaiman and Kendall, JJ.*) ALTAF BEGAM *v.* BRIJ NARAIN. **116 I.C. 855=1929 A.L.J. 367=51 All. 612=A.I.R. 1929 All. 281.**

———In the case of absolute sale or gift by a pardanashin lady, when the *bona fides* of the document executed by her are challenged, it is not necessary to prove that the terms of the document were explained to her if it is proved that she knew that it was an absolute conveyance of title by which she was divesting herself of all interest in the property and she ceased to claim any interest in the property after the execution of the document. (*B. B. Ghose and Basu, JJ.*) KALAMJAN BIBI *v.* SAHAJANA BIBI. **111 I.C. 746=A.I.R. 1929 Cal. 77.**

———The law throws round a pardanashin lady a special cloak of protection and a deed of a pardanashin lady to be valid must be one really understood by her.

A document was sent for a pardanashin lady's signature and after the signature on pleader's enquiring if she had executed and signed it, she answered in the affirmative. The deed was brought back in so short a time as to raise reasonable suspicion.

Held : that even if it be supposed that the document had been executed by the lady when the question was asked, it is impossible to hold that she had comprehended the intent and scope of the deed. (*Ross and Chatterji, JJ.*) MUHAMMAD IBRAHIM *v.* BIBI MARIAM. **117 I.C. 638=8 Pat. 484=A.I.R. 1929 Pat. 410.**

PARDANASHIN LADY—Knowledge and understanding.

———A mortgage deed executed by a pardanashin lady provided for compound interest with half-yearly rests. There was evidence to show that the terms of the transaction were explained to her, that she understood that she was to pay compound interest, and that she had independent advisers. Also the transaction was eminently a reasonable one on the part of the creditor.

Held : that in these circumstances compound interest should not be refused to the creditor. (*Stuart, C. J. and Raza, J.*) MT. PAT RAJ KUAR *v.* SHEO RAJ SINGH. **1 L.C. 330=A.I.R. 1927 Oudh 545.**

———*Proof of.*

Where the language used by the Registering Officer indicated that the document had been read out to the lady but there was nothing expressly indicating that he explained the document to the lady *held* there was no satisfactory evidence of explanation and understanding which the law requires. (*Lindsay and Sulaiman, JJ.*) MT. AISHA BIBI *v.* MT. MAHFIUZ-UN-NISSA BIBI. **78 I.C. 180=46 All. 310=22 A.L.J. 205=5 L.R.A. Civ. 97=A.I.R. 1924 All. 362.**

———A court dealing with the disposition of her property by a *pardanashin* woman ought to be satisfied that the transaction was explained to her and that she knew what she was doing. *Ashgar Ali* v. *Debee Banoo Begum* (3 Cal. 324) and 8 All. 267 : referred to. (*Abdul Raoof and Abdul Qadir, JJ.*) HARICHAND *v.* JUGAL KISHORE. **68 I.C. 722=5 L.L.J. 55=A.I.R. 1922 Lah. 349.**

———*Proof of.*

Where a deed of gift by a pardanashin was executed openly and registered in favour of her grandsons with herself as guardian and where she admitted before a Commissioner of Court that it was the donee's property and where the deed was produced and proved before the Registrar,

Held : when everybody else must have known about the contents of the document it is impossible to believe that the donor alone remained in ignorance. (*Dawson Miller, C. J. and Mullick, J.*) BAIJNATH SINGH *v.* BRIJRAJ KUER. **68 I.C. 383=2 Pat. 52=4 P.L.T. 239=A.I.R. 1922 Pat. 514.**

———*Contract to pay interest after mortgage period.*

It is no doubt true that every protection should be given to pardanashin ladies, and the proof required from persons who have entered into transactions with pardanashin ladies, and seek to enforce those transactions against them, should be adequate and satisfactory, but a contract to pay interest at a certain rate after the expiry of the period of the mortgage is not one which a lady cannot understand and it is therefore valid though a contention that such interest was to be paid in addition to the usufruct would not be upheld. (*Mr. Ameer Ali.*) RAJA SIR MOHAMMAD ALI MOHAMMED KHAN BAHADUR *v.* BUZI RAMZAN ALI. **69 I.C. 65=23 O. C. 150=24 C.W.N. 977=14 M.L.W. 710=7 O.L.J. 350=A. I. R. 1921 P.C. 100 (P.C.).**

———*Proof of.*

Where the registration of the document in dispute was effected at the lady's house, that she put her thumb impression and mark below the acknowledgment of execution and that her thumb-mark was also obtained in the Sub-Registrar's book, *held*, that in the circumstances, due execution by the lady could be safely assumed, that the document was understood by her and that it is not necessary that there should have been independent advice. (*Mears, C. J. and Banerji,*

PARDANASHIN LADY—Right to privileges.

J.) BEHARI LAL SAHU *v.* MUHAMMAD HASAN
63 I.C. 574=3 U.P.L.R. (All.) 191.

—Right to Privileges.

——*Illiterate and ignorant woman.*

There is no reason why a rule which is applicable to pardanashin ladies on the ground of their ignorance and illiteracy should be restricted to that class only and should not apply to the case of a poor woman who is equally ignorant and illiterate and is not pardanashin, simply because she does not belong to that class. If that view of the matter were adopted the effect clearly would be to confer an unfair advantage upon rich women as compared with poor women. The object of the rule of law is to protect the weak and helpless and it should not be restricted to a particular class of the community. Consequently even in a case of woman who is outside the regular pardanashin class, it is for those who deal with her to establish that she had the capacity of understanding that she entered into the transaction voluntarily and with full knowledge and import of what the transaction meant : 23 All. 137 (P.C.), Rel. on. (*Graham and Mitter, JJ.*) CHAINTA DASYA *v.* BHALKU DAS.
51 C.L.J. 465=A.I.R. 1930 Cal. 591.

——*Old person incommunion—Heirs.*

Where there is an elderly person, even an intelligent elderly person who is found to have divested himself or herself of a mass of property for the benefit of persons in close communion with the transferor, Courts will protect and in some cases zealously protect the interests of such persons. They will always demand explanations. If in addition to the fact that such person is aged and such person is a woman, the need for protection is greater. Where the woman is a pardanashin woman the need is greater still and where such woman is illiterate, it is greatest of all. Further the protection given to such a lady must be extended to her heirs after her death, since according to general law or Mahomedan Law the heirs are in the same position as the person to whom they are heirs. Under Imamia Law in particular there is special case to protect the heirs as against the intruder. It is for the person who has entered into transaction with the lady to justify it. In the absence of justification once it is shown that he has benefited by the transaction the transaction will be set aside : A.I.R. 1925 P.C. 204 ; 7 Cal. 245 (P.C.) ; 18 Cal. 545 (P.C.) ; 29 Cal. 749 (P.C.) ; 29 Cal. 664 ; 34 All. 455 (P.C.) ; 36 All. 81 and A.I.R. 1915 P.C. 24, Rel. on. (*Stuart, C.J., and Wazir Hasan, J.*) QAMAR ARA BEGAM *v*, SULTAN BEGAM. **6 O.W.N. 1112=A.I.R. 1930 Oudh 131.**

——Where the woman is a pardhanashin woman the need for protection is greater and where such woman is illiterate it is greatest of all. Further the protection given to such a lady must be extended to her heirs after her death since according to general law or Mohamadan law the heirs are in the same position as the person to whom they are heirs. Under Imamia Law in particular there is a special case to protect the heirs as against the intruder. (*Stuart, C.J., and Wazir Hasan, J.*) QAMAR ARA BEGUM *v.* SULTAN BEGUM. **6 O.W.N. 1112=A.I.R.1930 Oudh.31**

——Where a pardanashin lady has embarked on a scheme of house building for profit she must be taken to have given up the protection that the law affords to pardanashin ladies, and any contract by her with an agent for the supervision of such building must be treated from the point of view of an ordinary employer. (*Walmsley and Chakravarti, JJ.*) NAGENDRA NATH SINGH *v.* SRIMATI NAGENDRA BALA. **97 I.C. 200=43 C.L.J. 479=A.I.R. 1926 Cal. 988.**

PARENTAGE—Proof of.

——Where a pardanashin lady is literate and there is evidence to show that the lady has been carrying on litigation and has been entering into money transactions and is far from being inexperienced in such matters, *Held* ; that such a lady does not come under the description given in 8 All. 267 and 11 M.I.A. 551 of a pardanashin lady who ought to be protected by special privileges. (*Raoof and Fforde, JJ.*) MAHOMED SHAFI *v.* MT. KALSUM BI. **79 I.C. 260=4 Lah. 467=A.I.R. 1924 Lah. 200.**

——*Old men.*

The principles of law applicable to a pardanashin woman will not be extended to a man on the ground that he happens to be old and not in robust health. 3 Cal. 324 P.C. Ref. (*Daniels and Dalal, A. J. Cs.*) YAQUB BEG *v* RASUL BEG. **74 I.C. 517=10 O.L.J. 86=A.I.R. 1923 Oudh 254.**

—Miscellaneous.

—*Duty of Pleader.*

Where a pleader acting for a pardanashin lady never sees her, never speaks to her in reference to proceedings nor has he any communication with her upon the points raised in the suit, then he is deemed to have failed in his duty towards her. Conduct of a pleader who does not even take trouble to satisfy himself that he is really engaged on behalf of the pardanashin lady and his vakalatnama is really on her behalf and not on behalf of certain enemies of hers who wanted to ruin her, deserves severe condemnation : A. I. R. 1923 P. C. 13. Rel. on. (*Gokaran Nath Misra and Nanavutty, JJ.*) SHAH. MD. JAMIL ATA *v.* SHAH MD. HAFIZ ATA. **112 I.C. 522=5 O.W.N. 847=A.I.R. 1928 Oudh 449.**

—*Onus-proof.*

It is for the person who has entered into transaction with the lady to justify it. In the absence of justification once it is shown that he has benefited by the transaction the transaction will be set aside : A. I. R. 1925 P.C. 204; 7 Cal. 245 (P.C.); 18 Cal. 545 (P.C.); 29 Cal. 749 (P.C.); 29 Cal. 684 ; 34 All. 455 (P.C.) ; 38 All. 881 and A.I.R. 1915 P.C. 24, Rel. on. (*Stuart, C.J., and Wazir Hasan, J.*) QAMARARA BEGUM *v.* SULTAN BEGUM. **6 O.W.N.1112=A.I.R.1930 Oudh31.**

——*Practice.*

A lady who has appeared before the Committing Magistrate should not be allowed to be examined behind a parda in the Sessions Trial. (*Coutts and Ross, JJ.*) LACHHMI LAL *v.* KING-EMPEROR.
65 I.C. 1002=3 Pat. L.T. 398=1922 P.H.C.C. 159=23 Cr. L.J. 218=A.I.R. 1922 Pat. 40.

——*Coming to Court as plaintiff must prove allegations of fraud etc,—Suing as plaintiff and alleging fraud and deception, must prove it.*

If a transferee from a pardanashin lady comes into Court to enforce a deed executed by a lady, it lies upon him to prove that it was obtained from her fairly, that the terms of the deed were explained to her, that she had independent advice before executing the deed and that she had benefited by it. But when a pardanashin lady comes into Court as a plaintiff with specific allegations of fraud and deception it lies upon her to make out a *prima facie* case, before the transferee can be called upon to show that the deed had been properly obtained from her. (1899 A.W.N. 25, Foll.) (*Raoof and Fforde, JJ.*) MAHOMED SHAFI *v.* MT. KALSUM BI. **79 I.C. 260=4 Lah. 467=A.I.R. 1924 Lah. 200.**

PARDON.

See CR. P. CODE, SS. 337—339.

PARENTAGE —Proof of.

See EVIDENCE ACT, S. 112.

PARSI INTESTATE SUCCESSION ACT, (1865)—
Ss. 3 & 6—Will, construction of.
PAROL EVIDENCE.
See EVIDENCE ACT, Ss. 91—100.
PARSI INTESTATE SUCCESSION ACT, (21 OF 1865.)
—Ss. 3 & 6—Will, construction of.
———*Heir—Exclusion of.*

The Will of the testator provided that "my executors shall hold the residue" (of his property) "upon trust to pay the net income thereof to my son Jamsedji, for and during his life-time and from and after his death upon trust for the widow and children of my son Jamsedji absolutely as tenants-in-common. In the event of the said Jamsedji (testator's son) dying without leaving any widow or issue how low so ever, my executors shall stand possessed of the balance of said residuary trust estate in trust to appropriate a moiety of the balance to certain charitable objects and divided the other moiety amongst my heirs according to the law of intestate succession among Parsis but excluding the widow of Jamsedji from getting any share in such distribution." It was contended on behalf of the appellant that Jamsedji (testator's son) was one of the heirs named in the will of the testator, being thereby entitled according to the law of intestate succession among Parsis to four-sevenths of the moiety of the estate and that his rights after his death vested in the appellant, his widow, as his administratrix and that her rights as administratrix of the estate of Jamsedji were not affected by the provision to exclude her:

Held: the testator did not intend that his son Jamsedji should take any interest under his will as an heir. The only interest in his property which Jamsedji should take or have was a life-interest in the testator's property undisposed of under the earlier paragraphs of the will and the testator did not intend to include Jamsedji as one of his "heirs." The appellant could not claim anything as administratrix of Jamsedji testator's son. (*Lord Parmoor.*) SINBAI *v.* NUSSERWANJI RUSTOMJI. **69 I.C. 323=31 M.L.T. 213=49 I.A. 323=1922 M.W.N. 787=37 C.L.J. 420=25 Bom.L.R. 625=49 Cal. 1005=17 M.L.W. 174=27 C.W.N. 199=A.I.R. 1922 P.C. 311=45 M.L.J. 572 (P.C.).**

PARSI MARRIAGE AND DIVORCE ACT, (15 of 1865)
—S. 3—Absence of Certificate.
———*Admission of other Evidence.*

The certificate under S. 6 is not in itself one of the requisites for a valid marriage, so the absence of any entry in the register would not affect the validity of the marriage. The only way in which it would affect a suit under the Act would be as regards the manner of proof. So where there was no certificate, and, therefore, there was no entry in the register, any other relevant evidence is admissible. Had there been an entry in the register which was for some cause or other not available, on proper proof that it was not possible to produce the register, there would be no difficulty as to the admission of secondary evidence. (*Crump, J.*) BAI AWABAI *v.* KHODADAD ARDESHER. **45 Bom. 146=A.I.R. 1921 Bom. 189.**

PARSIS.
—Fire Temple Trust.
———*Who has right to use.*

The trusts of the Parsis Fire Temple are not for the benefit of all persons professing the Zoroastrian religion, but are limited to those who besides professing the Zoroastrian religion are also racial Parsis in the sense in which that word is understood in the Parsi community. 33 Bom. 509, Appr. (*Lord Phillimore.*) SAKLAT *v.* BELLA. **92 I.C. 200=30 C.W.N. 289=28 Bom. L.R. 161=53 I.A. 42=3 Rang. 582=23 A.L.J. 1016=43 C.L.J. 23=A.I.R. 1925 P.C. 298=49 M.L.J. 821 (P.C.).**

—Husband and Wife.
———*Contract Act, S. 23—Agreement to live separately.*

An agreement between a Parsi husband and wife for their living separate is a lawful and binding agreement. 23 Bom. 279 Foll. (*Macleod, C. J. and Fawcett, J.*) ERACHSHAW DOSABHAI TODDIWALA *v.* MST. DINBI. **59 I.C. 189=45 Bom. 318=A.I.R. 1921 Bom. 399.**

—Law applicable.
—*English Common Law.*

The law to be applied to the Parsis in the town and island of Bombay in a particular matter, in the absence of any statutory provision in respect of that matter, is the English Common Law so far as the circumstances of the place and of the inhabitants admit, and should for any reason such law be inapplicable the Court must decide the case according to "justice and right". (1867) 4 B.H.C. (O.C.) 1. Foll.; Case law discussed. (*Marten, C. J. and Kemp, J.*) HIRABAI JEHANGIR *v.* DINSHAW EDULJI. **98 I.C. 949=51 Bom. 167=28 Bom. L.R. 1334=A.I.R. 1927 Bom. 22.**

———*Devolution of property.*

Parsis are not subject to English law generally in respect of devolution of estates. (*Shah, Ag. C.J., and Marten, J.*) DADABHOI FRAMJI CAMA *v.* COWASJI DORABJI PANDAY. **77 I.C. 83=24 Bom. L.R. 1111=47 Bom. 349=A.I.R. 1923 Bom. 177.**

—Zoroastrian religion.
———*Conversion—Ritual—Zoroastrian religion allows conversion—Burushnum is not necessary.*

The Zoroastrian religion not only permits but it enjoins the conversion of a person born in another religion and of non-Zoroastrian parents. For such conversion a piece of ritual called burushnum is not an essential part: 33 Bom. 509, Dist. (*Lord Phillimore.*) SAKLAT *v.* BELLA. **92 I.C. 200=30 C.W.N. 289=28 Bom. L.R. 161=53 I.A. 42=3 Rang. 582=23 A.L.J. 1016=43 C.L.J. 23=A.I.R. 1925 P.C. 298=49 M.L.J. 821 (P.C.).**

PARTIAL REDEMPTION.
See T. P. ACT, S. 60.

PARTIES.
See (1) C. P. CODE, O. 1 AND O. 34.
(2) CONTRACT.
(3) CONTRACT ACT, S. 2.

PARTITION.
Decree.
Effect of.
Equity.
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Mode of division.
Partial Partition.
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Partition deed.
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Valuation.
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Miscellaneous.

—Decree.
———*Interlocutory order.*

Where the Subordinate Judge who ordered partition of certain items stayed the same for a time and

PARTITION—Decree.

then directed the Commissioner to effect the partition and one of the parties subsequently applied to his successor in office and he set aside the previous order for partition, *held*, that the later order was valid and that the same being of an interlocutory nature and final could not be interfered with in revision. (*Suhrawardy and Costello, JJ.*) JIBAN CHANDRA DUTTA *v.* AHLADINI DEBYA. **34 C.W.N. 731.**

———*C. P. Code, S. 2 (2)—Use of form of final decree.*

Where final decree for partition cannot be drawn up without a partition having been effected as directed by a preliminary decree but the Court though no partition is made uses the form of the final decree and signs it, the decree does not amount to final decree for partition. (*Subhedar, A. J. C.*) MT. LAXMIBAI *v.* TUKARAM. **122 I.C. 441 = 13 N.L.J. 83 = 26 N.L.R. 166 = A.I.R. 1930 Nag. 206.**

———*Nature of.*

A decree for partition is a joint declaration of rights of all the co-sharers interested in the property of which partition is sought and each co-sharer is entitled to obtain possession of the share allotted to him under the decree whether he may be a plaintiff or a defendant: 23 P. R. 1905, Foll. (*Zafar Ali, J.*) SARDAR MUHAMMUD *v.* ZAFAR-DIN. **107 I.C. 624 (Lah.)**

———*Need not be for all co-sharers.*

Although ordinarily in partition suits it is the practice to declare the shares of all the parties to the suit and to give a decree accordingly, it is nowhere laid down that in all circumstances a decree must be given in favour of all the co-sharers: 31 Bom. 271, Ref. (*Phillips, J.*) NARASAMMA *v.* SARASAMMAN. **92 I.C. 61 = 23 M.L.W. 157 = 1926 M.W.N. 163 = A.I.R. 1926 Mad. 353.**

———*Nature of.*

A partition decree is a joint declaration of the rights of persons interested in the property of which partition is sought and is a decree in favour of each sharer whether plaintiff or defendant. 32 All. 469 Foll. (*Neave, A. J. C.*) CHOB SINGH *v.* A. J. WILLIAMS. **91 I.C. 1009 = A.I.R. 1926 Oudh 230.**

———*Compensation for excess portion—No charge.*

Where under a partition decree one sharer is directed to pay a sum of money to others in order to compensate the latter on account of an excess portion allotted to the former, the remedy of those to whom payment is directed to be paid is by way of execution of the partition decree and a separate suit for enforcing payment of the sum allotted by the decree is not competent as the sum is not a charge on that property. (*Neave, A. J. C.*) CHOB SINGH *v.* A. J. WILLIAMS. **91 I.C. 1009 = A.I.R. 1926 Oudh 230.**

———*Nature of—Separate decree for each party.*

Where in the partition suit the plaintiff has obtained a money decree and the defendant has also been given such a decree, the plaintiff's decree can be executed without any reference to the decree given in favour of the defendant. Therefore when the decree obtained by the plaintiff has been transferred to another Court for execution, under the provisions of the C. P. Code., the defendant is not entitled to execute through the latter Court, the decree made in his favour without getting it transferred at his instance to that Court. (*Madhavan Nair, J.*) AYISA BIBI AMMAL *v.* JOKARA BIBI. **90 I.C. 869 = 22 M.L.W. 740 = A.I.R. 1925 Mad. 1265 = 49 M.L.J. 375.**

PARTITION—Effect of.

———*Compromise.*

Compromise is binding only on the parties that join in it. (*Mookerjee and Rankin, JJ.*) JARAPRASANNA *v.* KALIKAMOHAN. **75 I. C. 319 = 38 C. L. J. 111 = A. I. R. 1924 Cal. 80.**

———M purchased a decree for partition, executed it and obtained formal possession, *held*: M had good title to the property partitioned, and no conveyance is required to perfect such title. (*Pratt, J.*) MA THA *v.* MG PO KIN. **70 I. C. 843 = 1 Bur. L. J. 130 = A.I.R. 1923 Rang. 45.**

———*'Liberty to apply'.*

In a partition suit a compromise decree was passed defining the shares of the parties in certain properties and the decree reserved liberty to the parties "to apply to the Court as occasions arose". On a fresh suit for partition of the said properties along with some other property.

Held: that the liberty reserved would not enable the plaintiff to apply for partition of the properties when there was no order in the decree itself for such partition. "The liberty to apply" did not empower the Court to deal with matters outside the scope of the order. (*Chatterjee and Pearson, JJ.*) HANSESWAR PAL *v.* BEPIN BEHARY PAL. **A.I.R. 1922 Cal. 197.**

—Effect of.

———*Mere Specification of shares.*

Where there is no division of the holding or partition, a mere specification of shares does not amount to any division or partition. (*Mukerji and Bennet, JJ.*) RASULAN *v.* BABU. **122 I. C. 404 = 1930 A.L.J. 811 = A.I.R. 1930 All. 350.**

———In the great majority of partitions of common property, the partition is meant to be permanent. Therefore if nothing is known about a partition except that it has been made, it must be understood that it was a permanent partition unless somebody can give good reason for believing that it was temporary. (*Hallifax, A. J. C.*) KESHAVRAO *v.* MAROTI RAO. **92 I. C. 102 = 8 N.L.J. 227 = A. I. R. 1926 Nag. 139.**

———*Plea of irredeemable mortgage in possession.*

Where a co-sharer has been in possession of a plot of land under an irredeemable mortgage it is incumbent on him during the course of partition proceedings to set up his proprietary rights with regard to the plot and if he does not raise such a title then it is no more open to him to raise it in a Civil Court after the partition proceedings have become complete and final: 20 O.C. 336, Foll. (*Misra, J.*) BADRI DIN *v.* MUNESHWAR BAKSH SINGH. **96 I.C. 75 = 1 Luck. 210 = 6 O.W.N. 1223 = 13 O.L.J. 260 = A.I.R. 1926 Oudh 509.**

———*Easements.*

On a severance of tenements by a partition of joint property, and in the absence of a contrary intention, expressed or necessarily implied, all such easements as are apparent, continuous and necessary for enjoying any of the undivided shares when the partition was effected, pass to the co-parceners to whom such shares are respectively allotted in severalty. (*Mookerjee and Chotzner, JJ.*) SAROJINI DEVI *v.* KRISTA LAL HALDAR. **72 I.C. 576 = 36 C.L.J. 406 = A.I.R. 1923 Cal. 256.**

———*Charge of negligence against Manager.*

A separate suit is not maintainable if the claim in respect of which the suit was filed is a matter which should have been dealt with in partition proceedings. Where a charge of negligence is brought by a party in a partition suit against a Manager, that is a matter which should be dealt with in the suit when accounts are being taken. (*Macleod, C. J. and Shah, J.*)

PARTITION—Effect of.

GULABCHAND CHHOTIRAM MARWADI *v.* RAMNATH CHHOTIRAM MARWADI. **64 I.C. 995=46 Bom. 327=23 Bom. L.R. 1171=A.I.R. 1922 Bom. 119.**

———*Holders of Subordinate interest.*

The effect of partition does not necessarily invest a party with a right to actual possession of lands which are allotted to him. Persons holding interests in a village of a nature subordinate to the interest which is the subject-matter of partition cannot be held to be liable to ejectment on the ground that the land which they occupied is allotted to any particular co-sharer in the partition. (*Wazir Hasan, A. J. C.*) LIAQAT HUSAIN *v.* NAROTAM DAS. **65 I.C. 780=8 O.L.J. 516=A.I.R. 1921 Oudh 254.**

———*Rain water.*

Where an aperture was made in a common wall erected subsequent to a partition and it appeared that the house varied as regards the level, *Held* that the owner of the higher plot was entitled to let the rain-water on to the lower land through the aperture. (*Venkatasubbarao and Madhavan Nair, JJ.*) SINNANA GOWNDAN *v.* VEERAPPA GOWNDAN. **125 I.C. 529=1930 M.W.N. 133=A.I.R. 1930 Mad. 676.**

—Equity.

———*Applicability.*

The principle that in a partition suit all equities between the members of the co-parcenary should be worked out allotting to each member the share to which he is equitably entitled, is not restricted to co-tenants governed by Hindu Law. (26 Mad. 686 Ref.) (*Phillips, J.*) POOVANALINGAM SERVAI *v.* VEERAYI. **92 I.C. 1055=22 M.L.W. 782=1926 M.W.N. 114=A.I.R. 1926 Mad. 186.**

———*Mutual mistake.*

Where on partition, each party by mistake acquires possession of the plots allotted to the other, such possession is permissive and not adverse and each is liable to restore possession as soon as the other party restores his plot. When restoration to one party takes place to his original position, he cannot recover from the other without surrendering the benefit which he derived under the mistaken act. (*Wazir Hasan, A. J. C.*) MAQBUL AHMAD *v.* FARHAT ALI. **66 I.C. 461=8 O.L.J. 546=A.I.R. 1922 Oudh 152.**

—Minors.

———Bona fide *Arrangement.*

The existence of a minor is no legal obstacle in the way of the other members entering into a *bona fide* partition arrangement, so long as the rights of the minor are properly safe-guarded. (*Ananta Krishna Ayyar, J.*) PAKKARAN *v.* PATHUMMA UMMA. **A.I.R. 1930 Mad. 541.**

———Onus *of proof—Unconscionable nature.*

Where a partition between a minor and an adult co-owner is attacked by the minor as not binding on him and when it is found that at the time of the partition the minor's mother was a young widow, with no near male relations who could give independent advice to her, and when the defendant knows all about the property from the very beginning and a great disparity in extent of the two lands exists and when there is no ostensible reason for the partition except the wish of the defendant, the *onus* shifts and it is for the defendant to make out that the transaction was a fair one. The case of a co-owner asking for a division of property belonging to himself and a minor occupies a position between that of partition in a joint family and that of alienation by the guardian of a minor, whenever, an adult person deals with a minor through the minor's guardian, it is his duty to see that the transaction is a fair one and that the minor is not prejudiced in any way by any act or omission on his part. (*Spencer and Devadoss, JJ.*) S. PARAMASIVAM PILLAI *v.* MEENAKSHISUNDARAM. **73 I.C. 863=1922 M.W.N. 732=16 M.L.W. 721=A.I.R. 1923 Mad. 96.**

PARTITION—Partial partition.

—Mode of division.

———*Birt Jajmani.*

The division of the *birt jajmani* cannot be carried out by allotting clients to one party or the other, but only by the division of books and other accessories. 43 All. 20; 43 All. 35 & 15 C. L. J. 376, Ref. (*Ryves and Daniels, JJ.*) RAM CHANDAR *v.* CHHABBU LAL. **75 I.C. 323=21 A.L.J. 358=45 All. 445=4 L.R.A. Civ. 200=A.I.R. 1923 All. 350.**

———*Encumbrances.*

An undivided half share in a property was mortgaged to A, who foreclosed the mortgage and became complete owner of the half share. The other half share was later on sold to B. Neither the mortgage deed nor the sale.deed contained any mention of any incumbrance; it was found out later on that certain plots of land out of the whole property had already been sold and mortgaged prior to the date of the mortgage to A. *Held* in a partition of the property between A and B, the said plots should be included in B's share as what was sold to B was what remained after A had obtained his half share. (*Daniels, A. J.C.*) QAZI WALIUL HAQ *v.* MT. BIGGAN. **68 I.C. 977=9 Oudh L.J. 355=A.I.R. 1923 Oudh 42.**

———*Separate items.*

Where a part of the property to be partitioned is treated as separate from the rest, it is not improper to allow that part to be partitioned. (*Walmsley and Buckland, JJ.*) DURGACHARAN *v.* ENAMOL HUQ. **60 I.C. 762 (Cal.).**

—Partial Partition.

———*Common and Joint properties.*

A suit for partition of common properties, and not joint properties, is not liable to be dismissed on the ground that the suit did not include all the common properties available for partition: A. I. R. 1924 Mad. 124, Foll. A. I. R. 1923 Cal. 501, not Foll. (*Misra and Srivastava, JJ.*) HIRA LAL *v.* KALI CHARAN. **117 I.C. 412=6 O.W.N. 142=A.I.R. 1929 Oudh 162.**

———*Stranger, Plea by.*

It is doubtful if there is any general rule that an objection on the ground that the suit is one for partial partition can never be taken by a stranger. (*Ramesam, J.*) NAGUR PICHAI ROWTHER *v.* RAKKAPPA. **100 I.C. 202=A.I.R. 1927 Mad. 528.**

———*Plaintiffs entitled to a large share in a jote —Partition of only a small share cannot be allowed unless all lands of the jote are included.*

Although the rule is not inflexible that all joint properties should be brought into the hotch-pot in a suit for partition there are exceptional cases in which partial partition is allowed.

Where the plaintiffs were entitled to 15 as. 12 gds. share of an occupancy jote and they desired to have a partition of only 2 kanis odd of land within that jote:

Held: that there is no reason why such a partition should be allowed. All the lands of the jote should be included in the suit. (*B.B. Ghose and Panton, JJ.*) ANATH BANDHU DUTTA *v.* AISALI NAMADAS. **97 I.C. 188=43 C.L.J. 601=A.I.R. 1926 Cal. 1076.**

———*Buildings.*

Partition of buildings is possible while the sites on which they stand remain joint. (*Daniels and Neave JJ.*) MULTAN SINGH *v.* PADHAN MAR. **84 I.C. 74=22 A.L.J. 744=A.I.R. 1924 All. 854.**

PARTITION—Partial partition.

——It is well established that although co-owners cannot enforce a partition of a part only of the common lands, leaving the rest undivided, and although the entire property must be included in the partition, yet if, by mistake, fraud or like reason or by consent of the co-owners acting innocently and fairly, a partition of a portion only of their estate has been made whether by order of the court or otherwise, there is no reason why the court should not subsequently grant a division of the remainder at the instance of one or more of the co-owners. The substance of the matter is that the effect of a decree in a partition suit leaves untouched the joint title and possession of the parties in the remainder. (35 Cal. 961 Foll.) (*Mukerjee and Chotzner, JJ.*) BHUBAN MOHINI DASI *v.* KUMUD BALA DASI. **82 I.C. 934= 28 C.W.N. 131=39 C.L.J. 140=A.I.R. 1924 Cal. 467.**

——*Common and joint property.*

There is no direct authority that a suit for partition of common property, not joint property, is liable to dismissal on the ground that all the joint property in respect of which it might have been brought, has not been included. The plea of partial partition is not available when a suit for division of common property and not joint property, is in question. (*Oldfield and Devadoss, JJ.*) PAKKIRI KANNI *v.* HAJEE MOHAMMAD MANJOOR. **75 I.C. 334=46 Mad. 844= 18 M.L.W. 345=33 M.L.T. 44=1923 M.W.N. 565= A.I.R. 1924 Mad. 124=45 M.L.J. 321.**

——*Co-owner.*

It is no doubt proper that whenever practicable co-owners should be given a share in each item of the property. But this doctrine should not be too strictly applied. The principles governing cases of partition in joint Hindu families cannot apply to cases of co-owners. A co-owner can bring a suit for division of a particular property and any subsequent suit for division of other items is not ordinarily barred. (*Spencer and Devadoss, JJ.*) S. PARAMASIVAM *v.* MEENAKSHI SUNDARAM. **73 I.C. 863= 1922 M.W.N. 732=16 M.L.W. 721= A.I.R. 1923 Mad. 96.**

—Parties.

——*Persons not in possession.*

The necessary conditions for a suit for partition are : first, there must be unity of title and, secondly, there must be unity of possession.

The landlords instituted a suit for recovery of rent against *M* and four sons of *F*, brother of *M*. The landlords got a decree in their favour, purchased the holding at the execution sale and obtained possession. Later on, a suit was filed by the widow of *F* and daughter of *J*, another brother of *F* and *M* for recovery of their shares in the holding purchased by the landlords. The suit succeeded. The present suit was instituted by the landlords for partition of the holding against the widow and the daughter. The defence was that the suit was bad for defect of parties. But he admitted that the persons who had not been joined were not in possession. The landlords denied the title of these persons.

Held : that the plea of want of necessary parties was not open, for, the persons not joined in the suit could certainly assert their rights in a properly constituted suit, and that the partition suit was maintainable. (*Das, James and Rowland, JJ.*) WAJI HUNNISSA *v.* BANKEBEHARI SINGH. **11 P.L.T. 61= A.I.R. 1930 Pat. 177 (F.B.)**

——*Appeal.*

An appeal in a partition suit is incompetent unless all persons interested are made parties to the appeal, either as appellants or respondents. It may be, of course, that some of the parties to the appeal would not contest the appeal as their share may not be challenged. But this makes no difference. (*Greaves and B. B. Ghose, JJ.*) MD. ABJAL *v.* HAFIZANNESSA. **91 I.C. 567=A.I.R. 1926 Cal. 741.**

PARTITION—Partition deed.

——*Interested parties not impleaded.*

In a partition suit the fact that there are joint properties in which other persons are interested who are not parties to the suit is a bar to the partition of such properties; but that fact cannot debar the plaintiff from obtaining a decree in respect of the other properties, the persons interested in which have been made parties to the suit. (*Greaves and Chakravarti, JJ.*) NALINAKSHYA GHOSAL *v.* RAGHUNATH GHOSAL. **85 I.C. 662=A.I.R. 1925 Cal. 754.**

——*Mortgagee.*

In partition proceedings mortgagee is not a necessary party. His absence from the suit will not extinguish his mortgage when he is not a party. In such a case he can follow the property allotted in partition to the mortgagor but he has no remedy in case no property is allotted to mortgagor in partition. (*Dalal, J.C.*) JANKA *v.* SHIAM KISHORE LAL. **80 I.C. 483=11 O.L.J. 14=5 L.R. Oudh. 29= A.I.R. 1924 Oudh 307.**

——*Mortgagee in possession.*

Only owners and co-sharers are necessary parties to a partition proceeding. A mortgagee with possession may come under the definition of landlord, but he is in no sense an owner or a co-sharer and is not a necessary party and, therefore, he has no *locus standi* to object to the correctness of the partition proceedings, 2 P.R. 1918 (Rev.), Appr. (*Abdul Raoof, J.*) MUHAMMAD DIN *v.* MUHAMMAD. **67 I.C. 425= 3 L.L.J. 377=A.I.R. 1921 Lah. 83.**

—Partition deed.

——*Necessity for.*

There is no provision of law which requires that partitions must be reduced to writing and the writing registered, though when they are reduced to writing, the point of registration may arise. (*Shingue, J.*) RANGU *v.* LAKSHMAN. **32 Bom. L. R. 948= A.I.R. 1930 Bom. 438.**

——*Inadmissible—oral evidence.*

The fact of partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved for want of registration : 41 Bom. 466, Foll. (*Heald and Maung Ba, JJ.*) MAUNG SUN SEIN *v.* KO. LU. **111 I.C. 472= 6 Rang. 337 = A.I.R. 1928 Rang. 196.**

——*Private Partition.*

A private partition can be effected without any written document. (*Daniels, J.*) RAM KISHEN *v.* SHEO SAGAR PANDAY. **73 I.C. 462= A.I.R. 1924 All. 304.**

——*Recital as to date.*

Where the instrument of partition provided that the land should remain joint up to Kharif 1905 and become severalty only in that harvest,

Held that even if the sharers took possession of the plots allotted to them before kharif 1905, their possession up to that date was merely the possession of co-sharers in separate possession of portion of the joint estate. (*Le Rossignol and Harrison, JJ.*) HADAYAT KHAN *v.* SHAHNAND. **73 I.C. 665= A.I.R. 1924 Lah. 155.**

——There is no provision in the T. P. Act, 1882. prohibiting an oral partition either of immoveable or of moveable property. 6 L.B.R. 170 Foll. (*Heald and Lentaigne, JJ.*) MAUNG PO KIN *v.* MAUNG SHWE BYA. **76 I.C, 855= 1 Rang. 405=A.I.R. 1924 Rang. 155.**

PARTITION—Partition deed.

———*Inadmissible—Division in Status.*

To effect a severance of rights, an actual division by metes and bounds is not necessary. A deed which is ineffectual to effect a *de facto* actual division of the subject-matter may operate to effect a separation in interest and in right. A document which operates to convert a change in the status of the family and effect a division of right, when it is unregistered, is admissible in evidence to prove divided status. What is prohibited by the section is receiving a document as evidence of a transaction not merely receiving it in evidence, that is, as a piece of evidence having a bearing on the question to be ultimately decided. (Case-Law discussed.). (*Spencer and Venkatasubba Rao, JJ.*) (ATLURU) SARASWATAMMA *v.* (ATLURU) PADDAYYA. **71 I.C. 274=46 Mad. 349=18 M.L.W. 418=A.I.R. 1923 Mad. 297=44 M.L.J. 45.**

—Prior Partition.

———*Mistake in Commissioner's Allotment.*

Where in execution of a partition decree the commissioner apportioned the properties in a particular manner but it appeared subsequently in a later execution proceeding that the allotment was slightly mistaken in that an excess area had been given to one of the parties and the commissioner appointed in the later proceeding rectified the same, *Held* that what he did was perfectly reasonable. (*Mukerjee and Guha, JJ.*) KHAGENDRA NATH *v.* PRAFULLA KUMAR. **34 C.W.N. 909.**

———*Conformitg with the Shares.*

A partition for convenience of possession cannot stand in the way of a decree for partition so long as it is not found that the partition was in conformity with the shares of the respective parties. (*Walmsley and Mukherji, JJ.*) JOLFA BIBI *v.* AJALADDIN. **85 I.C. 1053=29 C.W.N. 229=A.I.R. 1925 Cal. 425.**

———*Partial partition.*

It is well established that although co-owners cannot enforce a partition of a part only of the common lands, leaving the rest undivided, and although the entire property must be included in the partition, yet if, by mistake, fraud or like reason or by consent of the co-owners acting innocently and fairly, a partition of a portion only of their estate has been made whether by order of the Court or otherwise, there is no reason why the Court should not subsequently grant a division of the remainder at the instance of one or more of the co-owners. The substance of the matter is that the effect of a decree in a partition suit leaves untouched the joint title and possession of the parties in the remainder, (35 Cal. 961, Foll.) (*Mukerjee and Chotzner, JJ.*) BHUBAN MOHINI DASI *v.* KUMUD BALA DASI. **82 I.C. 934=28 C.W.N. 131=39 C.L.J. 140=A.I.R. 1924 Cal. 467.**

—Right to.

———*Essentials for partiability.*

"Partition" is applicable only to those suits in which the plaintiff seeks to convert his joint ownership and joint possession of the whole property into separate ownership and separate possession of a portion of the property. Therefore a partition suit lies only when the plaintiff and the defendant have (1) unity of interest or title in the property sought to be partitioned and (2) unity of possession: 43 Cal. 504; 27 C. L. J. 441; A.I.R. 1923 Pat. 162 and 15 C. W. N. 677, Ref. (*Chari, J.*) MAUNG BA TU *v.* MA THET SU. **108 I.C. 809=5 Rang. 785=A.I.R. 1928 Rang. 73.**

———There can be partition between parties, the interest of one of whom is subordinate to that of the others: 23 C. L. J. 231, Dist. (*B. B. Ghose and Bose, JJ.*) MACNEIL & CO. *v.* SARODA SUNDARI DEBI. **114 I.C. 142=48 C.L.J. 374=33 C.W.N. 526=A.I.R. 1929 Cal. 83.**

PARTITION—Suit.

———The plaintiff is entitled to maintain a suit for partition if his possession to some part of the joint property is admitted or established. It is essential that he should be in actual or constructive possession of the properties, and whether he has such possession or not, is to be determined in view of the principle that the possession of one co-owner is *prima facie* the possession of all the co-owners, and his possession must be presumed to be in conformity with his right and title as co-owner. If it is established, that he is not in possession at all of any portion of the joint property, that there has been a complete ouster, he must sue for recovery of possession and partition. The suit does not cease to be one for partition, merely because the defendant denies the title of plaintiff to a share of the estate or to specific lands of the estate or to specific lands of the estate and asserts a hostile title and adverse possession therein. (*Duval and Miller, JJ.*) SABJAN BIBI *v.* ASANULLA SHEIKH. **101 I.C. 622=54 Cal. 524=31 C.W.N. 406=A.I.R. 1927 Cal. 411.**

———*Joint possession.*

The right of partition exists when two parties are in joint possession of land under permanent titles, although their titles may not be identical. (37 Cal. 918, Foll.) But it is difficult to say that the title of an occupancy raiyat is a permanent title within the rule. (*B. B. Ghose and Panton, JJ.*) ANATH BANDHU DUTTA *v.* AISALI NAMADAS. **97 I.C. 188=43 C.L.J. 601=A.I.R. 1926 Cal. 1076.**

———*Custom—(The Punjab.)*

A widow of a deceased co-sharer has a statutory right to demand partition. The *onus* is upon the party who disputes the widow's right to obtain a partition to prove that such right does not exist. (*Martineau and Moti Sagar, JJ.*) GHANSHAM *v.* RAMJI LAL. **73 I.C. 441=4 Lah. 344=5 L.L.J. 444=A.I.R. 1923 Lah. 625.**

———In order to succeed in a suit for partition there must not only be the unity of title but there must be unity of possession and if plaintiff is not in possession of the properties he is not entitled to a decree for partition. (*Coutts and Das, JJ.*) NANDKESHWAR MISRA *v.* SUDARSHAN RAM TEWARI. **68 I.C. 804=1924 P.H.C.C. 272=A.I.R. 1923 Pat. 162.**

———*Principles in dividing.*

The principle of partition is that, if a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made. If on the contrary no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share, which would fall to the plaintiff by partition. A claim by a co-owner to partition cannot ordinarily be resisted. (*Saunders, J.C.*) HARDANDAS PALADROY *v.* SUNDER. **64 I.C. 949=4 U.B.R. 57=A.I.R. 1922 U.B. 4.**

—Suit.

———*Principle—Prayer for particular item.*

If a party is anxious to get separate possession of his share in joint property, the mere ground that possession of such share would confer no benefit on him is no ground to refuse his prayer, but it would be a good ground for refusing it if the Court found that the grant of that relief would injure the remaining

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joint property. (*Jailal, J.*) RAHIMUDDIN *v.* MANNU LAL. **A.I.R. 1930 Lah. 639.**

———*Practice.*

Courts (in Bombay Presidency) should settle also disputes arising out of a partition suit in one litigation and should not leave the parties to have their rights determined piecemeal at different times, by different suits and perhaps by different Courts. (*Marten, C. J. and Murphy, J.*) MULJI NAROTAM *v.* MIRALAL RAMCHANDRA. **121 I.C. 439=31 Bom. L.R. 1067= A.I.R. 1929 Bom. 424.**

———*Rights* qua *co-sharers.*

In a partition suit the rights of the parties are to be determined *qua* co-sharers and the right which one co-sharer may have against the rights and interests of another under a mortgage cannot be enforced as the parties *qua* co-sharers have no interest whatever in the mortgage. (*Page and Mullick, JJ.*) PRASANNA KUMAR *v.* SATISH CHANDRA. **33 C.W.N. 851= A.I.R. 1929 Cal. 666.**

———*Prayer for joint possession.*

Where in a partition suit the plaintiffs claimed, along with one of the defendants, a certain definite share in the property in dispute and that defendant ad no objection to a decree being passed in favour of the plaintiffs subject to the reservation of his right:

Held: that the share may be assigned to the plaintiffs jointly along with the defendant. (*Iqbal Ahmad, J.*) MOHENDRA DUBE *v.* RAM BHAJAN. **100 I.C. 52=A.I.R. 1927 All. 822.**

———Defendant can avail of the suit by plaintiff as against other co-sharers for partition of his share and necessary reliefs. (*Kinkhede, A. J. C.*) BALKRISHNA *v.* SADASHEO. **97 I.C. 1023=A.I.R. 1927 Nag. 32.**

———*Position of parties.*

In a suit for partition the position of the parties is not that of the plaintiffs and defendants as in other suits: for in a partition suit, or in a suit for administration, or in a suit of a similar nature, every party stands in a position of a plaintiff with reference to another and that of the defendant with reference to some other. Therefore, unless there is a special reason, it is not possible to deny to a co-parcener the right of partition either at his own instance or at the instance of anyone else: 12 All. 506, Expl. and Dist. (*Suhrawardy and Duval, JJ.*) LOKE NATH SAHA *v.* RADHA GOBIND. **86 I.C. 765= A.I.R. 1926 Cal. 184.**

———*Scope of.*

A pleading in a partition suit that a certain part of the property must, because of a previous decision or for any other reason, be allotted to one share or the other, or must be left out of consideration in the division, cannot be called a withdrawal of that part of the property from the scope of the suit. (*Hallifax, A. J. C.*) SHIOSAHAI SONAR *v.* RAMKRISHNA. **92 I.C. 62=A.I.R. 1926 Nag. 61.**

———*Disputes between mortgagor and mortgagee.*

Considering that partition suits are always extremely complicated, it is certainly advisable that any question regarding disputes with regard to particulars, such as between a mortgagor and mortgagee, should be kept out of the main partition suit or if they are taken up in the course of the trial, very great care should be taken to keep such question separate as far as possible. (*Macleod, C.J. and Crump, J.*) BABUSING NARAYANJI *v.* SAMBHAJI SHIVAJI. **77 I.C. 449= A.I.R. 1923 Bom. 294.**

———*Preliminary decree—Dismissal.*

A court is completely wrong in dismissing a suit after a preliminary decree for partition has been passed on

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the ground that the lands which were partitioned by the Commissioner were different from the lands ordered to be partitioned under the preliminary decree. (*Das and Kulwant Sahay, JJ.*) RANJIT SAHI *v.* MAULAVI QASIM. **72 I.C. 916=2 Pat.432= 4 P.L.T. 257=A.I.R. 1923 Pat. 342.**

———*Plaintiff's title.*

If the title of the plaintiff cannot be made precarious by virtue of the periodical settlement for the assessment of revenue made by the Revenue authorities with defendant, there is nothing in the nature of the property which makes it impossible for partition by the Civil Court. (*Mukerjee and Buckland, JJ.*) MIDNAPORE ZAMINDARY CO, LTD., *v.* NARISH NARAYAN ROY. **65 I.C. 833=49 Cal. 37=33 C.L.J. 497= A. I. R. 1922 Cal. 345.**

———*Plaintiff failing—Defendant cannot get partition.*

Although it is the right of every defendant in a partition suit to ask to have his own share divided off and given to him and he is *qua* his claim to a share on partition in the position of a plaintiff; but, where the case of the plaintiff fails on the ground that he has no right to a share at all and that a suit for partition is not maintainable at his instance, the reason of the rule fails to apply, and there is no suit for partition and consequently for determining the defendant's share. The maxim applicable is "*cessants ratione, cessat ipsa lex.* (*Raymond, A.J.C.*) CHHOTIRAM MANGAMMAL *v.* LALCHAND. **66 I.C. 808=15 S.L.R. 195= A.I.R. 1922 Sind 4.**

———*Interest not co-ordinate—Balance of convenience.*

In a partition suit, the mere fact of the parties owning interests which are not co-ordinate in decree is not a bar to partition provided the entire 16 annas of the superior and inferior interests are actually represented, and the balance of convenience is under the circumstances in favour of allowing the partition. (*Das and Ross, JJ.*) JOHN SOLONO *v.* RAM NARAIN. **61 I. C. 378 (Pat.)**

———*Scope of—Conflict of title.*

In a suit for partition, it is incumbent upon the Court, before the preliminary decree is made, to determine whether the properties included in the suit are the joint properties, as alleged, of the parties to the litigation. A question can be raised and tried in a partition suit, though its solution interests only some of the parties to the litigation. In suits for partition questions may and do frequently arise which interest only some of the parties. A suit for partition may and does often involve the investigation of disputed questions of title and an attempt to avoid them, can only lead to needless multiplicity of litigation. The Court has ample authority to direct the successive trial of the issues separately affecting different defendants and even to record interlocutory judgments thereon so as to be made the basis of the final judgment at the conclusion of the trial of the whole case. There are cases where the broad proposition is asserted that whenever the title of the applicant is disputed or suspicious, equity will not proceed with the partition, until the dispute has been settled at law. A Court of equity however has jurisdiction to determine whether the title is free from suspicion and to proceed whenever in its judgment the title is clear; *Lucas* v. *King*; *Overton* v. *Woolfolk.* (1854) 10 N. J. Eq. 280; (1838) 6 Dana 374. The limitations attending proceedings in partition are constantly weakening, and the tendency to do full and complete justice to the parties in one action, is becoming irresistible, All

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persons who have an interest in the partition are proper parties, and matters in controversy amongst persons so interested in the partition must be decided in the suit. Where there is a conflicting claim to share in the land under the same right under which partition is sought, the determination of the conflict is incidental to the partition and cannot be avoided before partition is directed. Such a case does not fall within the category of claims utterly hostile where each demands not a share but the whole. (*Mookerjee and Cuming, JJ.*) ANNAPURNA DEBYA *v.* AMIYA NATH BANNERJEE. **68 I.C. 482=35 C.L.J. 530= A.I.R, 1922 Cal. 307.**

—Valuation.

———*Jurisdiction.*

Where the plaintiff in a partition suit seeks to separate only his own share of the joint property the value of the suit for purposes of jurisdiction is the value of the plaintiff's share and the same value determines the forum of appeal. The mere fact that the decree passed in the suit effects a partition *inter se* among all the co-sharers, would not affect the value of the suit. (*Shadi Lal, C.J., and Wilberforce, J.*) HARCHARAN DAS *v.* SUKHRAJ DAS. **62 I.C. 979(Lah.)**

———Where the plaintiff is out of possession of his share in the joint property, it is not a suit for mere partition but for a consequential relief in the shape of recovery of possession of his share in the property. In such a case the plaintiff has to pay Court fee upon the valuation of his share in the property.

A prayer, in a partition suit, asking for a declaration that certain decrees are void, comes under S. 7, Cl. 4 (*c*) of the Court Fees Act and the Court-fee payable thereon is *ad valorem* on the loss to the plaintiff. The valuation of the relief made by the plaintiff should be the criterion for the purpose of determining jurisdiction unless the said valuation is wrong or arbitrary.

Obiter :—In a partition suit the value of the plaintiff's share determines the valuation for jurisdiction. (1917) Pat. 301, Ref. (*Jwala Prasad and Adami, JJ.*) DUKHI SINGH *v.* HARIHAR SHAH **1921 P.H.C.C. 89=A.I.R. 1921 Pat. 78.**

—What plaintiff must prove.

———*Accounts.*

Before a plaintiff in a suit for rendition of accounts can succeed he must lay the foundation of his case by proving, by means of proper evidence, that the defendant is an accounting party. It is only then that the Court is justified in passing a preliminary decree in his favour and ordering the defendant to render account of his agency or stewardship in Court : (1905) A.W.N. 1 and 27 All. 374, Foll. (*Addison and Agha Haider, JJ.*) SRI RAM *v.* RAM KISHEN.

103 I. C. 114=A.I.R. 1927 Lah. 566.

———*Unity of title and possession—Both are necessary.*

In order to succeed in a suit for partition there must not only be the unity of title but there must be unity of possession and if, plaintiff is not in possession of the properties he is not entitled to a decree for partition. (*Coutts and Das, JJ.*) NANDKESHWAR MISRA *v.* SUDARSHAN RAM TEWARI.

68 I. C. 804=1924 P.H.C.C. 272= A.I.R. 1923 Pat 162.

———*Extent of share—Suit for—Plaintiff must state the extent of his share and it must be adjudicated upon.* (Per *Mullick J.*)

A proprietor who asks a Civil Court to partition his share in joint property must state the extent of his share in such property and there must be an adjudication between him and his co-sharers as to the extent of such share. (*Dawson Miller, C.J. Mullick and Bucknill, JJ.*) HARI KRISHNA SEN *v.* UMESH CHANDRA DUTT. **62 I.C. 962=2 P.L.T. 528= 6 P.L.J. 373=1921 P.H.C.C. 209= A.I.R 1921 Pat. 193 (F.B.)**

PARTITION ACT (1893)—Construction.

—Miscellaneous.

———*Suit for declaration—Appeal—Court-fee*

Since in a suit for partition by a co-sharer claiming to be in possession of a part of the property court-fee of Rs. 10 and not *ad valorem* court-fee is payable, the defendant appellant in such a suit is also entitled to file his appeal on the same court-fee : 28 All. 340 ; 12 C.W.N. 37; 38 Cal. 681 ; 34 All. 184 ; 43 Mad. 396; 5 Pat. L.J. 540, Foll.; 22 C.W.N. 669, Dist. (*Baguley and Mya Bu, JJ.*) (HAJEE) ABDUL RAHMAN *v.* A. B. CRISP. **A.I.R. 1930 Rang. 164.**

———*Mortgage--Rights--Assignment of—On partition.*

Where in a partition in the family of the mortgagee, the mortgage rights fell to the share of the plaintiff but before the completion of the partition the mortgagee died and was represented in the proceedings by his widow and all other members, *held* that the death before completion of the partition did not render the partition invalid. (*Rafique and Lindsay, JJ.*) ASLAH KHATUM *v.* BALDEU PRASAD. **70 I.C. 70=20 A.L.J. 957=A.I.R. 1923 All. 63.**

———*Record by Revenue Officer—Presumption.*

According to an agreement between the parties the actual possession of all *sir* and *khudkast* had been left undisturbed, the holder being recorded as a tenant of any such land as fell in patti other than his own.

The Amin at first entered a land as the defendant's *khudkasht* in the plaintiff's patti ; such a state of things is of course an impossibility and the officer who made the partition ordered the Amin to correct the entry; it was accordingly corrected into an entry showing the land as the plaintiffs *khudkasht* and the jamabandi containing this entry was accepted and signed as correct by the parties.

Held, the general statement of the Revenue officer that possession of *sir* and *khudkhast* has not been disturbed by no means excludes the possibility of exceptions being made and barely indicates that an exception appearing on the face of the record is due to a slip of the pen. (*Hallifax, A.J.C.*) NARSING *v.* KHANU. **A.I.R. 1923 Nag. 81.**

———*Jurisdiction—Revenue Court.*

Held, that the allotment of shares or plots to various co-sharers should be deemed to be matter within the exclusive jurisdiction of the Revenue Court. (*Sulaiman and Kendall, JJ.*) GANGA PRASAD *v.* BENI PRASAD. **1930 A.L.J. 601.**

———*Impartibility—Proof of—Hindu Law.*

The fact that for a number of generations a particular estate has remained undivided would not by itself show that this was on account of a family custom or tenure of the estate. The custom of impartibility must be strictly proved in order to control the ordinary Hindu Law of Property. (*Dhobley, A.J.C.*) KRISHNARAO *v.* NILKANTHA. **69 I.C. 800= 18 N.L.R. 163=5 N.L.J. 25=A.I.R. 1922 Nag. 52.**

———*Burden of proof.*

Where the mutation showed that the partition was made in the presence of the whole village and it was attacked subsequently on ground of fraud, *Held*, that the *onus* of establishing fraud was on the party alleging it. (*Dalip Singh, J.*) GORKHA *v.* KAHNUN. **30 Punj. L.R. 693.**

PARTITION ACT (4 of 1893.)

—Construction.

———*Strict.*

The Partition Act must be construed strictly as the

PARTITION ACT (1893)—Option to buy.

provisions of the Act exclude the right of the majority share-holder to acquire the property the subject of partition at the option of the minority shareholder. (*Banerji and King, JJ.*) RAM PRASAD *v.* MT. MUKANDI. **116 I.C. 851=1929 A.L.J. 651= A.I.R. 1929 All. 443.**

—Option to buy.

———*When to be exercised.*

Owner of a larger share who desires to exercise the option of buying the other share must do so in the first Court before the decree for partition has been actually made. (*Banerji, J.*) ABDUL HAQ *v.* MOTI LAL. **71 I.C. 983=A.I.R. 1923 All. 293.**

—Sale under.

———*Definite property.*

The sales which a partition Court can make under the Partition Act must be sales of complete shares and a sale always implies the transfer of ownership of some definite and specified property. (*Neave, A.J.C.*) CHOLI SINGH *v.* A. J. WILLIAMS. **91 I.C. 1009= A.I.R. 1926 Oudh 230.**

—S. 2—Applicability.

Action can be taken under the Partition Act when a partition cannot conveniently be made and not only when the property is wholly impartible. (*Broadway and Martineau, JJ.*) MD. MAJID ULLAH KHAN *v.* MD. HAMID ULLAH KHAN. **69 I.C. 196= A.I.R. 1924 Lah. 325.**

—S. 2—Application of Act.

———*When can be invoked.*

Where a suit for partition of property situated in business area of a town is instituted, a prayer that the partition should take place according to the Partition Act can be made at any stage of the litigation and the aid of the Act can be invoked where the parties asking the Court to apply the Act own more than a moiety of the property in dispute. (*Jai Lal, J.*) RAHIMUDDIN *v.* MANNU LAL. **A.I.R. 1930 Lah. 639.**

—S. 2—Partition decree.

If a decree for partition is found to cause undue inconvenience it is open to either party to apply for its modification by the application of the Partition Act. (*Saunders, J. C.*) HARDANDAS PALADROY *v.* SUNDER. **64 I.C. 949=4 U.B.R. 57=A.I.R. 1922 U.B. 4.**

—S. 2—Partition Impracticable.

———*House.*

When partition of a house is impracticable, Court can order it to be put to auction even in the absence of a formal objection by the parties as to the possibility of a satisfactory partition of the property. (*Wilberforce, J.*) GANDA RAM *v.* SONAYYA RAM. **66 I.C. 885=3 L.L.J. 102=A.I.R. 1921 Lah. 160.**

—S. 2—Principle.

The principle underlying S. 2 of the Act is that a partition ought not to be made if by partition the intrinsic value of the property sought to be partitioned would be destroyed. (*Iqbal Ahmad, J.*) MAHABIR RAI *v.* MAHADEO. **103 I.C. 367= A.I.R. 1927 All. 686.**

—S. 2—Procedure.

Property incapable of partition—Request for sale to highest co-sharer bidder—Property should be given to highest bidder above price fixed by Court. 7 I.C. 884 and A.I.R. 1929 All. 443, Rel. on. (*S. K. Ghose, J.*) MOHIT KRISHNA KUNDU *v.* PRANAB CHANDRA GHOSE. **A.I.R. 1930 Cal. 616.**

—S. 2—Request under.

———*Superior and Subordinate interests.*

Share-holders of different grades may sue for partition, because the right of partition exists when two persons are in joint possession of land under permanent titles although those titles may not be identical. An application under S. 2 of the Act contemplates a somewhat different set of circumstances. There may be partition as between persons possessing one moiety of the property in zamindari right and other persons possessing the other moiety in permanent tenancy right. But if there is an application by the tenants representing only the tenants' interest, it would be anomalous if that would give them a right to have a direction from the Court for the sale of the entire property, even though the zamindars were not willing: 37 Cal. 918 (P.C.) and 24 Cal. 575 (F.B.), Ref. (*S. K. Ghose, J.*) MOHIT KRISHNA KUNDU *v.* PRANAB CHANDRA GHOSE. **A.I.R. 1930 Cal. 616.**

PARTITION ACT (1893), S. 3—Procedure.

———*Sale to highest bidder.*

Where the request made by the co-sharer is that a sale may be held and that whoever among the co-sharers offers the highest bid may be given the property, the request does not amount to a request under S. 2, and so the provisions of the Partition Act do not apply. (*Banerji and King, JJ.*) RAM PRASAD *v.* MT. MUKUNDI. **116 I.C. 851= 1929 A.L.J. 651=A.I.R. 1929 All. 443.**

—S. 2—Right to buy.

———*Minor Sharer.*

Where a 14 annas co-sharer of a tank sued the 2 annas co-sharer and offered to buy the defendant's share, or in the alternative prayed that the property should be sold to the highest bidder and the defendant on the other hand prayed under S. 3 for the valuation of the plaintiff's share and for leave to buy the same.

Held: that defendant should be allowed to do so. (*Cuming and Page, JJ.*) ATUL CHANDRA *v.* BHUSAN CHANDRA. **97 I.C. 690=44 C.L.J. 47= A.I.R. 1926 Cal. 1190.**

—S. 2—Sale of portion.

Where there are two parcels, one capable of division but the other incapable of division, the Court is competent to direct a partition of the one and a sale of the other. An order directing a partition of property and sale of one of the allotments obtained after partition is not authorised by section 2 or section 9 of the Partition Act. (*Mookerjee and Chotzner, JJ.*) JADU NATH SARKAR *v.* HARAN CHANDRA SARKAR. **70 I.C. 687=49 Cal. 1043=36 C.L.J. 217= A.I.R. 1923 Cal. 221.**

—S. 3—Applicability.

Clause 2 of S. 3 applies only to a case where more than one co-sharer other than the person who has asked for the sale desire to buy the share of the party who has asked for the sale : 15 C. W. N. 552, Expl. and Dist. (*Cuming and Page, JJ.*) ATUL CHANDRA *v.* BHUSAN CHANDRA. **97 I. C. 690=44 C. L. J. 47= A.I.R. 1926 Cal. 1190.**

—S. 3—Application under.

———*When to be made.*

The proper time to apply under S. 3 is before a Court makes an order under S. 2. So, when under S. 2 sale has been ordered a sharer cannot apply to have property sold to him at valuation fixed by Court. (*Kumaraswami Sastri and Krishnan, JJ.*) ANGAMUTHU MUDALIAR *v.* RATNA MUDALIAR. **91 I.C. 516=48 Mad. 920= 22 M. L. W. 323=1925 M. W. N. 786= A.I.R. 1925 Mad. 1234=49 M.L.J. 411.**

—S. 3—Procedure.

Two or more co-sharers applying for leave to buy property—Procedure laid down in S. 3 (2) must be followed. 39 All. 672 and 15 C. W. N. 552, Dist. (*Iqbal Ahmad, J.*) MAHABIR RAI *v.* MAHADEV. **103 I.C. 367=A.I.R. 1927 All. 686.**

PARTITION ACT (1893), S. 4—Applicability.

—S. 4—Applicability.

Section 4 will apply even to a house a portion of which is already separated owing to one member selling his interest in it. (*Sen, J.*) MASITULLAH *v.* UMRAO. **119 I.C. 523=A.I.R. 1929 All. 414.**

—S. 4—Application under.

———*When to be made.*

An application under S. 4 can be made at any stage of a suit, even in the Appellate Court :22 C.W.N.515, Ref. (*Suhrawardy and Jack, JJ*) SATYABAMA DE *v.* JATINDRA MOHAN. **116 I. C. 161= 49 C.L.J. 136=A.I.R. 1929 Cal. 269.**

———The word "Court" is not confined to the Trial Court, but the power conferred by the section may be exercised even by an Appellate Court and, therefore, a Court of Appeal is as much entitled to pass an order under S. 4 as the Trial Court, and the right conferred by S. 4 may be exercised at any time before the final allotments take place. An Appellate Court therefore is not wrong in passing an order under the section even after it has remanded a case to the Trial Court for effecting partition. (*Suhrawardy and Duval, JJ.*) NISANKA SASHI ROY *v.* SWARGANATH BANERJEE. **90 I. C. 121=A.I.R. 1926 Cal. 95.**

—S. 4—Conditions for applicability.

For the application of S. 4: four conditions ought to be fulfilled.

(1) The house should be owned by an undivided family.

(2) The share of a co-sharer should have been transferred to a person who was a stranger to the family.

(3) The purchaser should have sued for partition; and

(4) A member of the family being a share-holder claims or undertakes to buy the share of the stranger transferee : 12 C. L. J. 525; and 35 All. 364, Ref. (*Sen, J.*) MASITULLAH *v.* UMRAO. **119 I. C. 523= A.I.R. 1929 All. 414.**

———S. 4 requires the presence of 3 conditions before the Court can take action under it : first that the dwelling house should belong to an undivided family : secondly, that a share thereof should have been transferred to a person who is not a member of such family, and thirdly, that the transferee should sue for partition. 12 C. L. J. 525, Ref. The operation of S. 4 of the Partition Act comes into play after the Court has found that the stranger transferee is entitled to partition. In fact no order can be passed under the Partition Act before the Court has found that such a transferee has succeeded in establishing his claim for a partition of the undivided homestead. (*Suhrawardy and Duval, JJ.*) NISANKA SASHI ROY *v.* SWARGANATH BANERJEE. **90 I. C. 121=A.I.R. 1926 Cal. 95.**

—S. 4—Decree under.

———*Form.*

Where the decree directed the defendants to pay the ascertained value of the plaintiff's share plus costs of the suit to him within two months, otherwise his suit for partition would be decreed, and he would be entitled to partition,

Held : that the decree was a good decree : 39 All. 672, Foll. (*Daniels, J.*) SAKTU MAL *v.* HAR PRASAD. **97 I.C. 416 (All).**

—S. 4—Effect of preliminary decree.

A preliminary decree was passed declaring defendants 3 and 5 to be entitled to buy plaintiff's share or allow his share to be divided. And defendants 3 and 5 appealed and plaintiff filed a cross-objection to the effect that the option to purchase could not be legally restricted to defendants 3 and 5. This cross-objection was not pressed. The case was remanded in appeal and then in the Trial Court the defendant No. 1, who was admittedly owner of half-share was given option to purchase on his application :—

PARTITION ACT (1893), S. 4—Parties in suit.

Held, that the preliminary decree in this suit could not take away from defendant No. 1 the option of purchase which was given to him under S. 4 of the Partition Act of 1893. 12 C. L. J. 525 and 45 Cal. 873 foll.

The fact that the objection taken by the plaintiff in appeal was dismissed is of no assistance to the defendants 3 to 5. The objection was not taken by the defendants and on the cross-objection not being pressed it would not have been open to them to insist on an objection that had been taken by the plaintiff. (*Newbould and Panton, JJ.*) KIRODI NARAIN BASU *v.* MRINALINI DASI. **69 I.C. 785=A.I.R. 1922 Cal. 129.**

—S. 4—' Family '.

———*Scope of.*

The word " family " as used in S. 4 ought to be given a liberal and comprehensive meaning, and it includes a group of persons related in blood, who live in one house under one head or management. It is not restricted to a body of persons who can trace their descent from a common ancestor ; and it is not necessary for the members to constitute an undivided family that they should constantly reside in the dwelling house, nor is it necessary that they should be joint in mess. It is sufficient if the members of the family are undivided *qua* the dwelling house which they own ; and it is the ownership of the dwelling house and not its actual occupation which brings the operation of the section into play ; and the object of the section is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferor's family have a right to live : 12 C. L. J. 525 ; 30 All. 324 ; 9 O.C. 156 ; and 23 Bom. 73, Rel. on. (*Mukerji, J.*) NIL KAMAL *v.* KAMAKSHYA CHARAN. **109 I.C. 67=A.I.R. 1928 Cal. 539.**

—S. 4—'House'.

The term " house " embraces, not merely the structure or building but includes also adjacent buildings, curtilages, garden, court-yard, orchard and all that is necessary for the convenient occupation of the house but not that which is only for the personal use and convenience of the occupier. It includes the land on which the structure of the dwelling house stands, and whether a particular plot of land is or is not necessary to the enjoyment of a house is to be determined on the evidence. (*Mukerji, J.*) NIL KAMAL *v.* KAMAKSHYA CHARAN. **109 I.C. 67=A.I.R. 1928 Cal. 539.**

—S. 4—Object.

The object of Section 4 of the Act is to enable the members of a family in the case of one of their members having transferred his share to an outsider who seeks partition, to buy out that outsider by having his share valued. The right given to a sharer to buy out a transferee who is not a member of the family is limited to a transferee who sues for partition and cannot be extended to any defendant co-sharer who may claim his share in a partition suit. (*Macleod, C.J. and Shah, J.*) KHANDERAO DATTATRAYA WAKDE *v.* BALKRISHNA MAHADEO PHULAMBRI KAR. **64 I.C. 917=46 Bom. 341=23 Bom. L.R. 1083= A.I.R. 1922 Bom. 121.**

—S. 4—Parties in suit.

A party in a partition suit whether a plaintiff or a defendant is at the same time a plaintiff as well as a defendant. This dual capacity of a party in a partition suit does not preclude even a defendant who claims a share in the dwelling house from being treated as

PARTITION ACT (1893), S. 4—Suit by stranger.
plaintiff for the purposes of S. 4: 12 C. L. J. 525, Ref. A. I. R. 1922 Bom. 121, Dist. (*Suhrawardy and Jack, JJ.*) SATYABHAMA DE *v.* JATINDRA MOHAN.
116 I.C. 161=49 C.L.J. 136=A.I.R. 1929 Cal. 269.
—S. 4—Suit by stranger.
Court must find whether house is dwelling house belonging to undivided family, and if any member undertakes to buy his share must value the house in fit manner. (*Banerji and Young, JJ.*) BRIJMOHAN LAL *v.* MAHBHUBAN. **123 I.C. 336= A.I.R. 1930 All. 509.**
—S. 4—'Undivided family.'
The words "undivided family" occurring in S. 4 are not restricted to mean a family joint in status but include a family divided in status but undivided "qua" the property in question and the provisions of S. 4 are therefore fully applicable to it: 30 All. 324; 12 C.L.J. 525, Foll.; 29 All. 308; 13 All. 282, Ref. (*Curgenven, J.*) SIVARAMAYYA *v.* VENKATA SUBBAMMA. **31 M.L.W. 238=53 Mad. 417= A.I.R. 1930 Mad. 561=58 M.L.J. 341.**
———*Scope of.*
The term "undivided family" in S. 4 has not been used in a technical sense and is applicable to Hindus and Muhammadans alike and must be held to have much the same meaning as the words "undivided family" in Cl. (2), S. 44, T. P. Act. (*Sen, J.*) MASITULLAH *v.* UMRAO. **119 I.C. 523= A.I.R. 1929 All. 414.**
—"Undivided" does not refer to a joint Hindu family but includes every family, Hindu or other, which is undivided *qua* the particular dwelling house, and includes a house which belongs to the family and in which members of the family have a right to live: 30 All. 324 (F. B.), Foll. (*Daniels, J.*) SAKTU MAL *v.* HAR PRASAD. **97 I.C. 416 (All.)**
—S. 6—Property incapable of partition.
Where the property is incapable of partition the Court should direct the sale to be held among the parties and the property should be given to that party who offers the highest price above the valuation of the Court. (*S. K. Ghose, J.*) MOHIT KRISHNA KUNDU *v.* PRANAB CHANDRA GHOSE. **52 C.L.J. 68=A.I.R. 1930 Cal. 616.**
—S. 7—Objection against sale.
———*Appeal.*
As defendants are entitled to prefer objections to a sale held under the provisions of S. 7, just as in the execution proceedings, an appeal lies against the decision on such objections. (*Johnstone, J.*) LABHU RAM *v.* RAM GOPAL. **118 I.C. 530=30 P.L.R. 604= A.I.R. 1929 Lah. 245.**
—S. 8—Appeal.
Where the trial Court allows a sale but the appellate Court refuses to pass an order for sale reversing the trial Court's order, the appellate order is a decree and is appealable if the requirements of second appeal under C. P. Code, S. 100 are fulfilled. (*Suhrawardy and Jack, JJ.*) SATYABHAMA DE *v.* JATINDRA MOHAN. **116 I.C. 161=49 C.L.J. 136=A.I.R. 1929 Cal. 269.**

PARTNER.
See (1) C. P. CODE, O. 30.
(2) CONTRACT ACT, Ss. 239—266.
(3) PARTNERSHIP.

PARTNERSHIP.
See also CONTRACT ACT, Ss. 239, 254.
Accounts.
Assets.
Authority.
Contracts.
Dissolution of.
Evidence of.
Goodwill.
Interest.
Partners-
Suit.
Termination of.
Winding up.
Miscellaneous.

—Accounts.
———*Dissolution—Goodwill should be taken into account.*
In a suit for dissolution of partnership while taking the accounts, the goodwill of the partnership firm should be included in the assets and should be brought into the common account. (*Lord Russel of Killowen*). SULEMAN *v.* ABDUL LATIF. **1930 A.L.J. 868= 34 C.W.N. 737=A.I.R. 1930 P.C. 185 (P.C.).**
———*Arrangemment between two or more pending suit—Effect on suit.*
A partnership was entered into between four persons, *R, K, G, C.* After *K's* death *R* instituted a suit for dissolution of the partnership and for rendition of account. It was contended that a certain arrangement had been arrived at between *R* and *G* after institution of the suit and this circumstance alone was sufficient to warrant the dismissal of *R's* suit.
Held: that whatever may have been the mutual settlement between *R* and *G* one of the partners, so far as the suit was concerned, it did not in any way affect it and the partnership account was to be adjusted between all the parties irrespective of any private arrangements between two or more of them *inter se.* (*Tekchand and Agha Haidar JJ.*) MANOHAR LAL *v.* RAM RICHPAL. **A.I.R. 1930 Lah. 655.**
———*Striking balance.*
In a working partnership there is a presumption that a partner has authority to strike balances in the firm account: 35 Mad. 142 and 37 Mad. 146, Ref. (*Dalip Singh J.*) RAM RATTAN *v.* SOBHA RAM. **A.I.R. 1929 Lah. 512.**
———*Date of Calculating—Rate of conversion.*
In the case of a partnership which is wound up the date on which the winding up was completed is the proper date for calculating the conversion of foreign currency into British Indian currency: *Manners v. Pearson*, (1898) 1 Ch. 581: not Foll. *Di Ferdinanado v. Simon*, (1920) 2 K.B. 704 Foll.; Other English case considered. (*Ramesam and Jackson JJ.*) MUTHIA CHETTY *v.* VEERAPPA CHETTY. **121 I.C. 498= 52 Mad. 509= 29 M.L.W. 636=1929 M.W.N. 345= A.I.R. 1929 Mad. 627=56 M.L.J. 776.**
———*Settled by agreement—Manner of enforcement.*
When a partnership is dissolved and accounts are settled, a partner must have some remedy at law to enforce the manner of settlement agreed upon: *De Taste* v. *Shaw*, 106 E. R. 244, Expl. (*Wallace, J.*) MULUMEDI JAGANNADHIAH *v.* PEDURI NARASIMHAM SETTY. **113 I.C. 669=1928 M.W.N. 690= A.I.R. 1928 Mad. 1133.**
———*Production of books.*
If a partner has kept accounts relating to the partnership in private books of his own, he must produce such books, for he should have kept his private accounts elsewhere, if he did not want them to be seen. After a dissolution, if books relate to the accounts which have to be taken, they must be produced: *Pickering* v. *Pickering*, 32 W. R. 511 and *Toulman* v. *Copland*, 3 Y. and C. Ex. 625, Rel. on- (*Aston, A.J. C.*) DIPCHAND GOLOMAL *v.* KIDNIBAI. **108 I.C. 873= 23 S.L.R. 313=A.I.R. 1928 Sind. 133.**

PARTNERSHIP—Accounts.

——*New partnership based on old—Account of the old may be gone into.*

Where a new partnership based on the old partnership is revived or reconstituted, by the consent of all the partners and their legal representatives, for the purpose of accounts, it is permissible to go into the accounts, of the old partnership on the basis of which the new one is constituted : 25 Mad. 26, Foll. (*Dalip Singh, J.*) DAYAL CHAND *v.* RAM CHAND.

102 I.C. 694=9 L.L.J. 119=28 P.L.R. 266= A.I.R. 1927 Lah. 249.

——*Sub-partnership—Grounds for relief—Not the same as for main partnership.*

Ordinarily, in a suit for settlement of account of a dissolved partnership and of any sub-partnership in which there are additional partners, the act or series of acts which give rise to relief for settlement of accounts of the main partnership are not the same as those which give rise to the relief for settlement of accounts of the sub-partnership. (*Rupchand Bilaram A. J. C.*) JETHUNAND *v.* CHETMAL.

90 I.C. 970=19 S.L.R. 395=A.I.R. 1926 Sind. 66.

——*Suppression of account—Presumption.*

Plaintiff brought a suit against four defendants. He alleged that a partnership was formed between them and that he had contributed Rs. 1,745 towards the capital, and that the defendants suppressed the amount and were causing him loss. He prayed for a decree for dissolution of partnership and a direction to the defendants to pay him the amount due to him including profits and interest. It was found that plaintiff's case was substantially true and he was granted a decree for the amount claimed with profits on the ground that as the defendants had suppressed the account presumption was against them. (*Venkatasubba Rao and Jackson, JJ.*) N. GANGULU NAIDU *v.* N. CHENGAMMA NAIDU. **85 I.C. 397= A.I.R. 1925 Mad. 237=47 M.L.J. 871.**

——*On one partner's death if survivors continue business accounts of old partnership can be taken at any time.*

When a partner dies the partnership comes to an end under the Contract Act. But nevertheless if the remaining partners continue the business for the purpose of ascertaining what shares those remaining partners brought into the new partnership an account may have to be taken of the old partnership. (*Krishnan, J.*) ABDUL JAFFAR *v.* VENUGOPAL CHETTIAR. **80 I.C. 378=34 M.L.T. 273=A.I.R. 1924 Mad. 708= 46 M.L.J. 503.**

——*Suit for share in particular item of assets—Proper remedy.*

A partnership was dissolved in 1910 by the death of one partner and a suit by the plaintiff in 1913 for partnership accounts and profits was dismissed on the ground of being barred by limitation. A second suit was lodged by the plaintiff for his share of assets alleged to have been received by the defendants as debts due to the old firm ; *Held*, in all cases where, after the dissolution and complete winding up of a partnership, an asset which had not been taken into account fell in, it ought to be divided between the ex-partners or their representatives according to their shares in the former partnership. If on the other hand no accounts have been taken and there is no contest, that the partners have squared up, then the proper remedy, where such an item falls in, is to have the accounts of the partnership taken. (*Lord Phillimore.*) K. GOPAL CHETTY *v.* L. G. VIJAYARAGHAVACHARIAR. **74 I.C. 621=45 Mad. 378= 1922 M.W.N. 386. 30 M. L. T. (P. C.) 283=26 C. W.N. 977=**

PARTNERSHIP—Accounts.

16 M. L.W. 200=49 I.A. 181= 24 Bom. L.R. 1197=36 C.L.J. 308= 20 A. L. J. 862=A.I.R. 1922 P.C. 115= 43 Mad. L..J. 305 (P.C.).

——*Legal representative of deceased partner—Suit on personal debt—Right to call for final accounts.*

A partnership was dissolved by the death of one of the partners. The surviving partner sued the legal representatives of the deceased partner for the recovery of certain sums of money due to the partner-ship firm by the deceased partner. These sums were alleged to be sums borrowed by the deceased partner on his own account and repaid out of the partnership money and they included also an amount said to have been overdrawn by the deceased partner and therefore due to the firm. The accounts of the partnership had never been taken and the defendant had no personal knowledge of the transactions and business of the partnership.

Held : that the defendants were entitled to have all the questions at issue determined by the taking of final accounts as it was impossible to do justice to all the parties without taking a final account of the partnership and that the suit merely for the recovery of sums without taking accounts was not maintainable. (*Phillips add Odgers JJ.*) RAMASWAMI *v.* MUTHUKARUPPAN. **88 I.C. 153=1925 M.W.N. 497= A.I.R. 1925 Mad. 737=48 M.L.J. 444.**

——*Leave to prove items.*

In a suit for dissolution of partnership and accounts, either the partnership accounts should be taken as they stand, or if any items are objected to by the other side as false, the parties should be given an opportunity of proving the accounts. It is not equitable to reject certain items without giving an opportunity of proving them. (*Baker J. C.*) RAHIM BUX *v.* AKBARKHAN. **7 N.L.J. 212=A.I.R. 1925 Nag. 188.**

——*Dissolution completed—Asset left out—How division to be effected.*

In all cases where, after the dissolution and complete winding up of a partnership, an asset which had not been taken into account fell in, it ought to be divided between the ex-partners or their representatives according to their shares in the former partnership. If on the other hand no accounts have been taken and there is no contest, that the partners have squared up, then the proper remedy, where such an item falls in, is to have the accounts of the partnership taken : (*Lord Phillimore.*) K. GOPAL CHETTY *v.* L. G. VIJAYARAGHAVACHARIAR. **74 I.C. 621=45 Mad. 378= 1922 M.W.N. 386=30 M. L.T. (P. C.) 283= 26 C. W.N. 977=16 M. L.W. 200= 49 I.A. 181=24 Bom. L.R. 1197= 36 C.L.J. 308=20 All. L. J. 862= A.I.R. 1922 P.C. 115=43 M.L.J. 305 (P.C.).**

——*Suit for accounts without a claim to dissolution.*

Where a partner withholds the annual profits of a concern from a member of the firm, the partner excluded from the profits may bring a suit for an account and for his share of the profits and such a suit shall not be dismissed for the reason that the plaintiff does not claim a dissolution. To hold the contrary, would be contrary to the principles of justice, equity and good conscience.(*Abdul Raoof and Campbell, JJ.*) FIRM OF RAI BAHADUR HARI MAL MELA RAM *v.* FIRM OF KIRPARAM BRIJ LAL. **66 I.C. 478= 2 Lah. 351=A.I.R. 1922 Lah. 195.**

——*Suit for partial account—When relief could be given.*

In regard to suits by one partner against another

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for a partial account the general rule applied in India is, that, if the account is sought in respect of a matter which, though arising out of a partner-ship business, or connected with it, does not involve the taking of general accounts, the Court will as a rule, give the relief applied for. It will be for the Court to determine under what circumstances it will be equitable to order a partial account, having regard to the rights of the parties under the contract. There is no rule of law now in force that a partial account can be ordered only under exceptional circumstances. (*Abdul Raoof and Campbell, JJ.*) FIRM OF RAI BAHADHUR HARJI MAL MELA RAM *v.* FIRM OF KIRPARAM BRIJ LAL. **66 I.C. 478=2 Lah. 351= A.I.R. 1922 Lah. 195.**

———*Refusal to render Service.*

The fact that certain partners deliberately withheld their due services under the contract should be taken into consideration in a suit for accounts of the partnership. (*Lord Buckmaster*) W. KRISHNAMACHARIAR A. SANKARA SAH **57 I.C. 713= 22 Bom. L.R. 1343= 28 M.L.T. 265=12 M.L.W. 777=33 C.L.J. 1= 25 C.W.N 314=A.J.R. 1921 P.C. 91 39 M.L.J. 257 (P.C.),**

———*Sub-Partner's right to sue for accounts.*

A suit by a sub-partner for an account of the partnership is maintainable against his partner and he must accept the accounts in the main partnership as settled between the partners of that partnership unless *mala fides* or mistake has been shown, (*Fawcett, J. C. and Kemp A. J. C.*) GIDASINGH *v.* BIEHCHAND, **60 I.C. 967=14 S.L.R. 193.**

—Assets.

———*Goodwill included in.*

The term "partnership assets" must be deemed to include the good will of the business, for the plaintiff is entitled to a share in the good will as well as to a share in the actual assets of the business. (*Phillips and Thiruvenkatachariar, JJ.*) RAMAKRISHNA AYYAR *v.* MUTHUSWAMI AYYAR. **121 I.C. 609=52 Mad. 672=29 M.L.W. 560= A.I.R. 1929 Mad. 456=56 M. L. J, 657.**

———*Money given away.*

Money or property given away does not continue to be the assets of the firm when it is given over to a third party. (*B. B. Ghose and Roy, JJ.*) SOLEMA BIBI *v.* HAFEZ MAHOMED. **104 I.C. 833= 54 Cal. 687=A.I.R. 1927 Cal. 836.**

———Costs should come out of partnership assets. (*Mirza, J.*) ANANDRAO *v.* NAPU. **94 I.C. 153= 28 Bom. L.R. 386=A.I.R. 1926 Bom. 289.**

—Authority.

———*Dealing with surviving partner.*

A party dealing with the surviving partner cannot realise upon the latter's apparent authority of surviving partners if that party does not profess to deal with him as such party. (*Venkata Subba Rao, J.*) BABU *v.* GOKULDOSS. **30 M.L.W. 657= A.I.R. 1930 Mad. 393=57 M.L.J. 404.**

———*Pronote by some for money due on taking accounts—Others not bound.*

Where two of the partners of a firm execute a promissory note in favour of a third agreeing to pay him a certain sum of money as being due to him on taking partnership accounts, the remaining partners of the firm will not be bound by the promissory note. (*Mukerji and Young, JJ.*) HOSHIAR SINGH *v.* UDERI RAM SINGH. **117 I.C. 108=1929 A.L.J. 929= A.I.R. 1929 All. 542.**

———The assignee of a partner is not bound by any settlement of accounts entered into by the remaining partners behind his back and after notice of assignment: 4 M. L. W. 10, Ref.; A. I. R. 1925 Bom. 347; *Stevenson & Sons* v. *Aktiengeselachaft Fur Cartounagen Industries*, (1918) A.C. 239; *Feather Stau haugh* v. *Fenwick*, 17 Ves. 298; *Cassels* v. *Stewarts*, (1881) 6 A.C. 64; *Watts* v. *Driscoll*, (1901) 1 Ch. 294, Rel. on. (*Ramesam and Jackson, JJ.*) MUTHIAH CHETTY *v.* VEERAPPA CHETTY. **121 I.C. 498= 52 Mad. 509=29 M.L.W. 636=1929 M.W.N. 345= A.I.R. 1929 Mad. 627=56 M.L.J. 776.**

PARTNERSHIP—Contracts.

———*Debts of old partnership taken over by members of the new—Liability.*

If a newly constituted partnership agrees among its members that the members of the new partnership shall have the power to bind it for the taking on of the debts of the previous firm which the new partnership had taken over, that would be binding on the new partnership, provided, however, there is anything in the transaction to show that the persons who executed the bills or notes or whatever are relied upon, were purporting to act on behalf of the new partnership. (*Coutts-Trotter, C.J. and Srinivasa Aiyangar, J.*) PANDURANGA BHATTA *v.* KRISHNA NAYAK. **105 I.C. 209=39 M.L.T. 266= A.I.R. 1927 Mad. 889=53 M.L.J. 303.**

———*Arbitration—All partners must join.*

One partner of a firm cannot enter into an agreement to refer a matter in dispute to arbitration on behalf of a firm unless all partners join in it. (*Addison, J.*) FIRM RADHAKISHEN *v.* FIRM AHSA MAL. **92 I.C. 705=7 L.L.J. 603= A.I.R. 1926 Lah. 91.**

———*Release of joint cause of action—Reference to arbitration.*

A joint cause of action can be released by any partner so as to validily bind the others in the absence of fraud. But a partner cannot bind his firm by submission to arbitration in the absence of special authority. (*Raymond, A.J.C.*) FIRM MAYADAS LAKHMIDAS *v.* FIRM BHAGWANDAS PARMANAND. **76 I.C. 359=A.I.R. 1924 Sind 41.**

———*Negotiable instrument by one partner—Liability of others.*

In the case of partnerships not of a mercantile character there is no implied authority in one partner to bind the others by negotiable instruments. He must have express authority. It is otherwise in the case of an ordinary trading partnership. A partnership in a Rice Mill is not a trading partnership. 10 L.B.R. 321 and 39 Bom. 261 Dist. (*Robinson, C. J. and Duckworth, J.*) MAUNG PHO MYA *v.* A.M. DAWOOD & CO. **66 I.C. 584=11 L.B.R. 137= A.I.R. 1921 L.B. 44.**

—Contracts.

———*Damages for breach of covenant by one partner—No suit lies.*

The rule is that as between partners ordinarily no suit will lie except one for general account. No suit lies by one partner against another for damages for breach of certain covenants in the partnership deed. In such cases the proper course is to bring a suit for general accounts and debiting the defaulting partner with any loss that might have been incurred by his action, in the general account; A.I.R. 1921 P.C. 91 Foll.; 32 Mad. 76, Dist. (*Krishnan and Odgers, JJ.*) K. V. SANTHANAKRISHNA NAIDU *v.* K. S. CHELLAPPA AIYAR. **101 I.C. 390= 25 M.L.W. 506=38 M.L.T. 345= A.I.R. 1927 Mad. 650.**

———*Contract between partners relating to partnership—Material facts must be disclosed.*

Where a contract is entered into by one partner

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with another in relation to the interest of the partnership, the partner is under a duty to make a full disclosure of all the material facts which he knows and which would assist the other parties in deciding whether or not to enter into the contract. (*Schwabe, C.J. and Coutts-Trotter, J.*) W. BRUNSON *v.* JOHN E. C. BRUNSON. **78 I.C. 299=A.I.R. 1925 Mad. 360.**

———*Contract of old firm—Right of new firm to enforce.*

If a partner of a firm retires after the firm has entered into a contract and a new partner joins the firm, the newly constituted firm is different from the old firm and cannot institute a suit on the contract entered into by the latter except when the new firm took over by arrangement all the liabilities and outstandings of the old firm. (*Kemp, A.J.C.*) FIRM OF MANGHOOMAL *v.* FIRM ARATMAL. **65 I.C. 26= 15 S. L. R. 152=A.I.R. 1922 Sind 13.**

—Dissolution of.

———*Position of parties in a suit for.*

The position of parties in a partnership suit is in some particulars different from that of the position of parties in an ordinary suit (say for money). Thus each of the partners to a partnership suit, however he may be formally ranked, is really in turn plaintiff and defendant and in both capacities comes before the Court for the adjudication of his rights relatively to the other partners which the Court endeavours to determine by its decree. Further, in a partnership case the positions of the parties may be transposed, that is, a defendant may become a plaintiff or one or more defendants may be found entitled with the plaintiff to certain sums of money payable by one or more of the remaining defendants. In such latter case there is one decree divisible in certain fixed proportions among the plaintiff or plaintiffs and the particular defendant or defendants. (*Broadway and Topp, JJ.*) ARURA MAL UTTAM CHAND *v.* MAKHAN MAL AMIR CHAND. **122 I.C. 730=31 P.L.R. 258= 11 Lah. 358=A.I.R. 1930 Lah. 725.**

———*Member of a joint Hindu family representing the family in a partnership—Other members not necessary parties in suit for.*

Where a member of a joint Hindu family enters into a partnership, he might be representing the family of which he may be a member and may as such be accountable to the other members of the family; but so far as other parties to the deed of partnership are concerned, they must confine themselves to the terms of the deed itself and cannot be permitted to travel beyond it by raising a plea that his brother, a person not party to the said deed, should have been impleaded in a suit for dissolution of partnership. (*Tek Chand and Agha Haidar, JJ.*) MANOHAR LAL *v.* RAM RICHHPAL. **A.I.R. 1930 Lah. 655.**

———*Agreement on dissolution—Vitiated by error or fraud.*

An agreement entered into on a dissolution will be set aside if it can be shown to have been based upon error or to have been tainted by fraud, whether in the shape of positive misrepresentation or of concealment of the truth. (*Anantakrishna Ayyar, J.*) KURUNDITI AMMAL *v.* KUNHI KANNAN. **123 I.C. 596= A.I.R. 1930 Mad. 141.**

———*Suspension of business—Inference as to.*

That though it is true that a mere suspension of business of partnership does not necessarily lead to the conclusion that there has been a dissolution of that partnership, still the cessation of the business coupled with other circumstances may legitimately lead to the inference that the partnership had been dissolved; A.I.R. 1927 P.C. 70 and A.I.R. 1925 All. 787, Dist. (*Iqbal Ahmad and Kendal, JJ.*) BAIJNATH *v.* CHHOTE LAL. **107 I.C. 673=26 A.L.J. 243= A.I.R. 1928 All. 58.**

PARTNERSHIP—Dissolution of.

———*Balance struck after dissolution—Firm not liable.*

After a partnership has been dissolved and accounts settled any balance struck by a partner is one without authority and consideration. It does not create any liability on the firm. (*Jai Lal, J.*) BHANUN RAM *v.* JIWANDA RAM. **95 I.C. 88=A.I.R. 1926 Lah. 522.**

———*Partnership for fixed term—Suit for before expiry.*

Even when a partnership is entered into for a fixed term a decree for dissolution may be passed when the mutual confidence which the partners reposed in each other at the time when the partnership was entered into has ceased. (*Abdul Raoof and Martineau, JJ.*) TULASIRAM *v.* DINA NATH. **89 I.C. 333= A.I.R. 1926 Lah. 145.**

———*Branch firm with other members—Suit to wind up both main and branch.*

A suit for dissolution and winding up of a firm and its branch firm which consist of certain additional partners who have no interest in the main firm is bad for multifariousness. 3 S. L. R. 108, Foll. (*Rupchand Bilaram, A. J. C.*) JETHANAND *v.* CHETUMAL. **90 I.C. 970=19 S.L.R. 395=A.I.R. 1926 Sind 66.**

———*Plaintiff's appropriation of partnership amounts as receiver in suit for—Mode of adjustment.*

Plaintiff filed a suit for dissolution of partnership against defendant who was his partner. Each partner contributed towards the capital as much as he liked charging 9 p.c. interest, and plaintiff was to get 10 as. share and defendant was to get 6 as. share. After his appointment as receiver, plaintiff appropriated a large amount of partnership amount to his own use without sanction from the Court. There were liabilities due from the firm to others and assets in form of book debts due from others, and houses.

Held: that the proper order to pass is one charging the plaintiff with the sums withdrawn by him as being partnership assets in his hands with at least mercantile interest from the dates of withdrawal, and that subject to the discharge of all outside liabilities, costs and expenses, the sum so realised ought to be applied as far as it would extend in satisfaction of the respective claims on capital account of the plaintiff and defendant, any deficiency being made good out of the house properties. (*Lord Blanesburgh.*) MT. NAG KUER *v.* SHAM LAL. **92 I.C. 274= 1926 M.W.N. 101=23 M.L.W. 628=7 P.L.T. 275= 23 A.L.J. 1045=A.I.R. 1925 P.C. 257 (P.C.).**

———*Partner at will—Right of.*

In a partnership at will a partner is entitled to dissolution. It is not an equitable right but it is a legal right, under the Code and under the contract. (*Lord Dunedin.*) RAM SINGH *v.* RAM CMAND. **79 I.C. 944=22 A.L.J. 14=19 M.L.W. 4= 1924 M.W.N. 76=33 M.L.T. 465=26 Bom. L.R. 196= 2 Pat. L.R. 94=5 Lah. 23=28 C.W.N. 566= 5 L.R.P.C. 46=51 I.A. 154=40 C.L.J. 276= 2 P.L.R. 1924=A.I.R. 1924 P.C. 2= 46 M.L.J. 158 (P.C.).**

———*Partnership for fixed term—Suit before expiry.*

It is the duty of the Courts to bring about the fulfilment of the expectations of the parties, and where a partnership has been entered into for a fixed term, the courts should not permit a partner to drive the others to a dissolution. (*Abdul Raoof and Campbell, JJ.*) FIRM OF RAI BAHADUR HARI MAL MELA

PARTNERSHIP—Dissolution of.

RAM *v.* FIRM OF KIRPARAM BRIJ LAL. **66 I.C. 479 = 2 Lah. 351 = A.I.R. 1922 Lah. 195.**

———*Presumption as to continuance.*

Where the persons who intended to retire from the business did in fact continue to associate with its work, a presumption may legitimately be drawn in favour of the continuance of the partnership. (*Mookerjee and Panton, JJ.*) PULIN BIHARI *v.* MAHENDRACHENDRA. **67 I.C. 10 = 34 C.L.J. 405 = A.I.R. 1921 Cal. 722.**

———*Stoppage of business—Refusal to advance.*

Neither stoppage of business nor refusal of a partner to make further advances on capital account can be treated as dissolution of the firm. (*Mookerjee and Walmsley, JJ.*) HARAMOHAN PODDAR *v.* SUDARSON PODDAR. **66 I.C. 811 = 25 C.W.N. 847 = A.I.R. 1921 Cal. 538.**

—Evidence of.

———*Share not proved.*

The mere fact that a person has not succeeded in proving his share in the partnership does not necessarily lead to the conclusion that partnership was not entered into. (*Shadi Lal, C. J. and Broadway, J.*) GHULAM HUSSAIN *v.* TULLA SHAH RAM SARAN. **120 I.C. 170 = A.I.R. 1930 Lah. 142.**

———*Absence of deed--How partnership is proved—No written agreement—Plaintiff must prove existance of partnership—In absence of direct evidence it is to be proved by correspondence, admissions, etc.*

Where there is no written agreement of partnership, it is necessary for the plaintiff to show that the conduct of the parties towards one another, the mode in which they have dealt with one another, and the mode in which each has with the knowledge of the other dealt with other people, raises a necessary presumption that a partnership was entered into. As a rule, in the absence of direct evidence of partnership the relationship is shown by books of account, by correspondence, by the evidence of employees by admissions, and so forth. (*LeRossignol and Fforde, JJ.*) HAKAM RAI *v.* GANGA RAM. **94 I.C. 633 = 8 L.L.J. 111 = 27 P.L.R. 273 = A.I.R. 1926 Lah. 340.**

—Goodwill.

The goodwill of a business means every affirmative advantage, as contrasted with negative advantage that has been acquired in carrying on the business, whether connected with the premises of the business or its name or style and everything connected with or carrying with it the benefit of the business : *Cruttwell* v. *Lye*, (1810) 17 *Ves.* 335 ; *Trego* v. *Hunt*, (1896) A. C. 7, Cons. ; *Churton* v. *Douglas*, (1859) 28 L. J. Ch 84, Foll. (*De Souza, A.J.C.*) HAJI ABDUL LATIF *v.* SULEMAN UMAR. **110 I.C. 639 = 23 S. L. R. 471 = A. I. R. 1929 Sind 85.**

———*Effect of competition on value of.*

The effectiveness of possible or probable competition should be one of the main determining factors in the valuation of goodwill. (*De Souza, A. J. C.*) HAJI ABDUL LATIF *v.* SULEMAN UMAR. **110 I. C. 639 = 23 S.L.R. 471 = A.I.R. 1929 Sind 85.**

———*How valued.*

Goodwill is generally valued at so many years purchase on the amount of profits. And these annual profits are generally calculated on an average of 3 years : *Davis* v. *Hodgson*, (1858) 119 R. R. 379 ; *Page* v. *Ratliffe*, (1896) 75 L. T. R. 371 ; *Von Au* v. *Magenheirmer*, 115 App. Div. 81 ; 20 *Harv* v. *Law Rev.* 235, Cons. (*De Souza, A. J. C.*) HAJI ABDUL LATIF *v.* SULEMAN UMAR. **110 I. C. 639 = 23 S.L.R. 471 = A.I.R. 1929 Sind 85.**

—Interest.

———*From date of final decree.*

In an action to dissolve and wind up the affairs of a partnership, until the accounts have been taken it is impossible to say what if anything is due from any partner or co-partners; interest, therefore, should only be allowed to the plaintiffs from the date of final decree by which the amount (if any) is found to be due from the defendants to the plaintiffs and not from the date of the plaint. (*Lord Russell of Killowen*). SULEMAN *v.* ABDUL LATIF. **1930 A. L. J. 868 = 34 C.W.N. 737 = A.I.R. 1930 P.C. 185 (P.C.).**

———*Overdrawings.*

A partner is not charged with interest in respect of overdrawings. (*Lord Russell of Killowen*). SULEMAN *v.* ABDUL LATIF. **1930 A. L. J. 868 = 34 C.W.N. 737 = A.I.R. 1930 P.C. 185 (P.C.).**

———*Assignee—Claim to interest or profit.*

Where an assignment of a partner's share the partnership is dissolved and a new firm is formed by the remaining partners, the assignee is entitled at his option either to profits of the new firm or interest : A. I. R. 1915 P. C. 116, Rel. on. (*Ramesam and Jackson, JJ.*) MUTHIAH CHETTY *v.* VEERAPPA CHETTY. **121 I. C. 498 = 52 Mad. 509 = 29 M. L. W. 636 = 1929 M.W.N. 345 = A.I.R. 1929 Mad. 627 = 56 M. L. J. 776**

———*Partner putting in his own money—Entitled to interest.*

Where a partner invests capital of his own in the parnership business, he should in equity be allowed to charge interest on the capital so employed in making up the profit and loss account of business. (*obiter*) (*Exparte Chippendale*, (1853) Ch. 4 D. M. and G. 19 36, Foll. (*De Souza, A.J.C.*) HAJI ABDUL LATIF, *v.* SULEMAN UMAR. **110 I.C. 639 = 23 S.L.R. 471 = A.I.R. 1929 Sind 85.**

———*As between partners—Money advanced beyond Share capital.*

As a general rule, interest is not allowed between partners unless there is an agreement or trade custom, but this rule is subject to an important qualification, *viz.*, that interest is payable to a partner on money advanced by the partner for partnership purposes beyond the capital he has agreed to subscribe. 23 C.L.J. 148, Ref. (*Aston, A.J.C.*) DIPCHAND GOLOMAL *v.* KISHNIBAI. **108 I.C. 873 = 23 S.L.R. 313 = A.I.R. 1928 Sind 133.**

———*On moneys drawn—On advances made after preliminary decree.*

Interest on moneys drawn by a partner from the partnership funds—be it capital or interest—cannot be allowed unless it is so provided in the deed : *Meymott* v. *Meymott*, (1852) 32 *L.J. Ch.* 218, *Foll*, Also interest on advances upto the date not of the dissolution which had been effected by the preliminary decree but right up to the date of final decree cannot be allowed: *Barfield* v. *Lough Borough*, (1872) 8 Ch., 1, Foll. (*Coutts-Trotter, C.J, and Viswanatha Sastri, J.*) UMAMAHESWARA MUDALI *v.* MUNUSWAMI MUDALI. **94 I.C. 306 = 1926 M.W.N. 465 = A.I.R. 1926 Mad. 642. 50 M.L.J. 428.**

———Interest is not usually allowed by a Court in partnership suits, except on sums advanced in excess of the capital agreed to be contributed. (*Scott-Smith and Abdul, Raoof, JJ.*) MST. RAM PIARI *v.* SULTAN BUKHSH. **77 I.C. 207 = 3 Lah. 382 = A.I.R 1923 Lah. 115.**

———*Partner putting in money beyond his share capital entitled to interest.*

In the absence of an express or implied stipulation or trade custom to the contrary, interest is payable to a partner for money paid or advanced by him

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to the firm beyond the amount agreed to be subscribed as capital, the payment being treated not as an increase of capital but rather as a loan, (23 C.L.J. 48 Foll. (*Hallifax, A.J.C.*) GOVIND *v.* THAKUR GAJRASINGH. **64 I.C. 183=4 N.L.J. 39= A.I.R. 1921 Nag. 45.**

—Partners.

———*Fraud practiced by working partners on sleeping partners.*

In a suit upon a promissory note it was found that working partners of a firm prepared and produced accounts before the sleeping partners on the faith of which the latter took upon themselves the partnership business and sent off the working partners promising to pay them under a promissory note a sum of money after giving the former some cash and some logs of timber.

Held, that having regard to the fraud practiced upon the sleeping partners as shown by the numerous instances of falsification of accounts by the working partners, the settlement was not binding upon the managing partners and that the promissory note was accordingly vitiated. 5 M.I.A. 872 (P. C.) and Law *v.* Law (1905) 1 Ch. 140 Ref. (*Anantha-krishna Iyer, J*). KRUNNDITIAMMAL *v.* KUNH KANNAN. **123 I.C. 596=A.I.R. 1930 Mad. 141.**

———*Retiring Partner—Rights of—Election as to interest or share in profits—When to be made—Portion of assets only used—Right to share in profits.*

The retiring partner can, in the absence of an agreement to the contrary, claim not only interest but at his option either a share of the profits of the business which was continued with his assets or interest on the amount of his share of the partnership assets. He is not bound to make his election until the share of the profits that would fall to him has been ascertained and hence his final election must be postponed until the accounts have been taken. And for such retiring partner to be able to claim his share of the profits, it is not necessary that the whole of the partnership assets should be used by the remaining partners. For if any portion of the assets are so used, the retiring partner, who has a share in every portion of the partnership assets, is entitled to a similar share in the profits, if any portion of those profits has been utilized in making the profits: 4 M. L. W. 521. Not Appr.; 23 Bom. 544 (P.C.); A. I. R. 1924 P. C. 93 and A.I.R. 1915 P. C. 116, Rel. on: *Manley* v. *Sartori*, (1927) 1 Ch. 157, Foll.; *Stevenson & Sons* v. *Aktiengesellschaft*, (1918) A. C. 239, Cons. (*Phillips and Thiruvenkatachariar, JJ.*) RAMAKRISHNA AYYAR *v.* MUTHUSAMI AYYAR. **121 I.C. 609=52 Mad. 672= 29 M.L.W. 560=A.I.R. 1929 Mad. 456= 56 M.L.J. 657.**

———*Money-lending business.*

Where money-lending business is carried on by certain persons with no other object except to divide the interest arising from the transaction, the persons are partners and not mere co-owners. 8 Cal. 1011 Dist. (*Mohiuddin, A. J. C.*) MULCHAND *v.* TARACHAND. **116 I.C. 646=A.I.R. 1929 Nag. 137.**

———*Execution by one partner—Form of the document.*

A pro-note was headed "The Lahore Cotton Baling Press" and signed by one *G* alone. A suit was brought against *G* and *H* alleging that *H* was the partner and thus liable.

Held: that the form of the document showed that *H* was not liable: A. I. R. 1918 P. C. 146, Relied on. (*Broadway and Agha Haidar, JJ.*) D. JOHNSTON

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v. MT. JAN BIBI. **111 I.C. 645= A.I.R. 1928 Lah. 722.**

———*Service of Summons—On authorized Agent—Liability to decree of individual partners.*

Where the summonses issued to the firm were duly served upon an authorized agent who actually appeared in Court and produced a power-of-attorney executed by both partners in his favour which empowered him to act not only on behalf of the firm, but on behalf of each partner individually and jointly:

Held: that the service on him was service upon each partner individually and a decree passed against the firm can be executed against the partners individually: 19 C. W. N. 1008, Ref. (*Tekchand, J.*) LAL CHAND *v.* FIRM DWARKADAS. **108 I.C. 528= A.I.R. 1928 Lah. 528.**

———*Borrowing from Firm by one Partner—Mortgage falling to the share of one—No assignment—Maintainability of a suit by him,*

One of the partners of a firm borrowed money from the firm and executed a mortgage in favour of the firm. After dissolution of the firm, accounts were settled and it was arranged that another partner should have the mortgage as his share of profits due to him. No formal assignment of the mortgage was made. Assignee of the mortgage sued on the mortgage. Other partners, who were on record, did not challenge his right to sue.

Held: that the suit is maintainable although no formal assignment was obtained: 11 M.L.T. 246 and A.I.R. 1921 Mad. 137, Dist.; 21 M.L. J. 80, Appr.

Held: further, that the mortgage debt was a valid debt although one of the mortgagees was the same person as the mortgagor; and the mortgage was enforceable for there is nothing in law to prevent a partner borrowing from his firm and being in the position of a debtor to his firm: 32 Mad. 76 Foll.; A.I.R. 1925 Mad. 737 and *Jackson* v. *Shephard*, 149 E. R, 800, Rel. on; *Boyce* v. *Edbrooke*, (1903) 1 Ch. 836 and *Napier* v. *Williams*, (1911) 1 Ch. 361 Dist. (*Wallace, J.*) JAGANNADHIA *v.* NARASIMHAM. **113 I.C. 669=1928 M.W.N. 690= A.I.R. 1928 Mad. 1133.**

———*Entertainment allowance.*

If a partner, who entertains customers, wishes to be re-imbursed, he should take the precaution of having an agreement made for an allowance: (English Case-law discussed.) (*Aston, A.J.C.*) DIPCHAND GOLOMAL *v.* KISHNIBAI. **108 I.C. 873=23 S.L.R. 313= A.I.R. 1928 Sind 133.**

———*Accommodation to another firm—If partners in that firm,*

Where one firm was helping another firm by advancing money to discharge a portion of their income-tax liabilities, it is not a sufficient proof that the partners in the one concern are necessarily partners in the other. (*Le Rossignol and Fforde, JJ.*) HAKAM RAI *v.* GANGA RAM. **94 I.C. 633=8 L.L.J. 111= 27 P.L.R. 273=A.I.R 1926 Lah. 340.**

———*Loss due to negligence—Liability of negligent partner.*

One partner is not liable, in a suit for accounts upon a dissolution of partnership, for the probable loss sustained by the firm owing to the neglect or failure of one partner to carry out the duties imposed upon him by the partnership agreement to the prejudice of the firm's business. (*Macleod, C.J. and Coyajee, J.*) MAHADEV VITHO PATIL *v.* GANOO CHANGOO PATIL. **87 I.C. 735=27 Bom.L.R. 500= A.I.R. 1926 Bom. 324.**

———*Return of goods after dissolution—Liability of firm to goods retained.*

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Where goods are sent to a firm on inspection during the continuance of the partnership and out of them those that are not required are returned after the dissolution of the partnership, though the cause of action may not arise till the unrequired goods are returned, yet all those persons who were members of the firm at the time the goods were sent to it on inspection will be liable for the goods taken. (*Buckland, J.*) MAURICE MAYAHAS *v.* W. MORLEY. **87 I.C. 508 = 29 C.W.N. 496 = A.I.R. 1925 Cal. 937.**

———*Claim of one partner—Separate action—If sustainable.*

Unless the claim by a partner to recover a sum of money from the other partners in respect of a transaction of the partnership forms part of the inquiry in the action for winding up the partnership, it is not sustainable; no suit will lie therefor after limitation has expired for a suit for an account. (45 Mad. 378 (P.C.) Ref. to.) (*Ramesam and Jackson, JJ.*) RAMASWAMI NATHAN *v.* MUTHIAH CHETTY. **85 I.C. 931 = 43 Mad. 432 = 21 M.L.W. 75 = A.I.R. 1923 Mad. 279 = 17 M.L.J. 829.**

———*Son of partner—Liability as partner.*

Where a father and son are joint and the father carries on a business which becomes involved in difficulties, the son does not make himself liable as a partner by assisting his father in his difficulties by writing letters and signing them in the name of the firm, by appearing in legal proceedings against his father, etc. (*Raymond and Percival, A.J.Cs.*) TULSIDAS AMANMAL *v.* MESSR. LYON LORD & CO. **86 I.C. 934 = 18 S.L.R. 117 = A.I.R. 1923 Sind 225.**

———*Son's name—Business carried on in—If son a partner.*

The mere fact that a man carries on a business in the name of his son does not establish that the son is a partner in the business. The firm being named after the son may be due to the father regarding the son's name as propitious for the purpose of the business. The use of the name could not make the son a partner unless there was a consentient act on his part indicating that he was a member of the firm. (*Raymond and Percival, A.J'Cs.*) TULSIDASS AMANMAL *v.* MESSRS. LYON LORD & CO.

86 I.C. 934 = 18 S.L.R. 117 = A.I.R. 1923 Sind 225.

———*Son joint with father—Right in father's business.*

The fact of the son being joint with his father does not *ipso facto* give the former any right in his father's business unless it be a joint family business. (*Raymond and Percival, A. J. Cs.*) TULSIDAS AMANMAL *v.* MESSRS. LYON LORD & CO. **86 I.C 934 = 18 S.L.R. 117 = A.I.R. 1925 Sind 225.**

———*Absent partner—Breach of license by one partner—Liability of absent partner—Nature of partnership liability.*

Two excise licensees J. and T. who were partners in a country liquor shop license had been convicted under S. 64 (c) of the U.P. Excise Act 1910 of committing a breach of the conditions of the license by selling liquor out of the prescribed hours and also by selling adulterated liquor. T. was present at the shop when these offences were detected. J. the other licensee was not present and there was no suggestion that he knew anything about the irregular sales.

Held: that J's. conviction was right, he being equally guilty as T. (24 B. 423 and 9 A.L.J. 283 Ref.) The real test so far as agency is concerned is not the nature of the act but the nature of the business. The nature of the act is the test which decides the criminality. The law of partnership is merely a breach of the law of agency just like the law of master and servant, and for this purpose two partners stand to one another in the same relation as master and servant. (*Walsh, J.*) JWALA PRASAD *v.* KING-EMPEROR. **82 I.C. 139 = 45 All. 642 = 25 Cr.L.J. 1211 = A.I.R. 1924 All. 101.**

PARTNERSHIP—Suit.

———*Promoters of Company.*

Promoters of a company are not partners but may be such if promoting is carried on as a business or if some business incidental to promoting is carried on as business. (*Mookerjee and Rankin, JJ.*) WILLIAM ROWE RAE *v.* LEWIS PUGH EVANS PUGH.

83 I.C. 970 = 39 C.L.J. 537 = A.I.R. 1924 Cal. 940.

———*Borrowing by one.*

Where one partner borrows money for partnership business and it is put down to the account of the partnership, both the partners are liable. (*Maung Kin, J.*) MAUNG PO SIN *v.* VELLAYAPPA CHETTY.

62 I.C. 315 = 10 L.B.R. 321.

———*Creditor—Partner can also be creditor but other partners only contribute proportionately.*

A partner in a firm can have a dual capacity, that of creditor of the firm as well as that of partner in it; in the absence of an express or implied stipulation or trade custom to the contrary, interest is payable to a partner for money paid or advanced by him to the firm beyond the amount agreed to be subscribed as capital, the payment being treated not as an increase of capital but rather as a loan. (23 C. L. J, 48, Foll.) But such partner is not only a promisee of the firm, but he is also one of the joint promisors to himself, and under the second paragraph of S. 43 of the Contract Act he can only call upon each of the other joint promisors to contribute equally to the payment to be made to himself as promisee. (*Hallifax, A. J. C.*) GOVIND *v.* THAKUR GAJRASINGH.

64 I.C. 183 = 4 N.L.J. 39 = A.I.R. 1921 Nag. 45.

———*Burma Railways.*

The Burma Railways Company are not partners with the Secretary of State for India and are therefore not owners of the Railway system and all its premises in virtue of being *partners* with the Secretary of State for India. (*Robinson, C. J. Maung Kin and Heald, JJ.*) BURMA RAILWAYS COMPANY *v.* SECRETARY OF STATE. **64 I.C. 801 = 11 L.B.R. 33 = A.I.R. 1921 L.B. 9.**

—Suit.

———*Recovery of money.*

When there has been a partnership there can be no suit for the recovery of the money due until it is known what amount is due. (*Dalal, J.*) GUR DIYAL *v.* SUKHNANDUNLAL. **117 I.C. 824 = A.I.R. 1929 All. 236.**

———*One partner can sue on a contract in his name.*

There is no absolute rule of law that one partner of a firm cannot sue for a debt that is due to the firm. A partner with whom a contract has been personally made is entitled to sue upon that contract in his own name without joining the co-partners as plaintiffs, although the benefit of the contract would result to the partnership firm: that is really an illustration of the rule that an agent, having an interest in the contract which he has entered into on behalf of his principal is entitled to sue in his own name: 14 Moore P. C. 160; 24 Mad. 130 and A.I.R. 1925 Bom. 547, Foll. (*Fawcett and Murphy, JJ.*) KAPURJI MAGNIRAM *v.* PANNAJI DEVICHAND. **113 I.C. 341 = 53 Bom. 110 = 30 Bom.L.R. 1560 = A.I.R. 1929 Bom. 177.**

———*Suit as between partners.*

The rule is that as between partners ordinarily no suit will lie except one for general account. (*Krishnan*

PARTNERSHIP—Suit.

and Odgers, JJ.) K. V. SANTHAKRISHNA NAIDU *v* K. S. CHELLAPPA IYER. **101 I.C. 390= 25 M.L.W. 506=A.I.R. 1927 Mad. 650= 38 ML.T. 345.**

———*Between partners for private debt.*

One partner can sue another for advances made by him not to the partnership concern, but to the other partner in respect of what he is to contribute to the joint capital. (*Madhavan Nair, J.*) UTHIRA REDDIAR *v.* MUTHU REDDIAR. **97 I.C. 757= A.I.R. 1927 Mad. 68.**

———*Between partners--Action without calling for general accounts—When maintainable.*

It was a very well established rule in English Law that Courts would not interfere between one partner and another unless it was for the purpose of dissolving the partnership, or if it was dissolved, of finally winding up its affairs. This rule has in later years been considerably relaxed because it was found to work hardship in certain cases and in the result Courts have interfered in order to prevent a partner deriving advantage from his own misconduct and have not insisted on the other partners submitting either to continuance of the wrong or to a dissolution. But the question as to whether an action should be allowed to be maintained without taking a general account of the partnership dealings must depend for its answer on the circumstances of each case and upon whether justice can really be done without taking such account. The principle is that, where justice requires that all the dealings of the partnership should be finally determined, the Courts will not allow a partial account to be taken but when the basis of the claim is unconnected with the partnership business, or is only very remotely connected therewith, an action is maintainable, when no injustice is caused by dealing with this one claim separately. (*English and Indian Case Law discussed.*) (*Phillips and Odgers, JJ.*) RAMASWAMI *v.* MUTHUKARUPPAN. **88 I.C. 153= 1925 M.W.N. 497=A.I.R. 1925 Mad. 737= 48 M.L.J. 444.**

———*Against one partner* bona fide *submission to arbitration—Liability of others.*

Where one of several partners who is sued by a third party submits the dispute to arbitration, the award will not bind the other partners at the instance of the third party. Where however the submission has been made in good faith and the partner has to make payments in accordance with the award passed in the submission in good faith, then the partner is entitled to claim contribution from his partners on the basis of the award. (*Abdur Rahim, O.C.J. and Moore, J.*) VENKATACHALLAM CHETTY *v.* RAMANADHAN CHETTY. **59 I.C. 501=1920 M.W.N 502= 12 L.W. 228=39 M.L.J. 269.**

—Termination of.

———*Buying out a partner—Payment to arbitrator with notice not to pay—If operates as termination.*

A and *B*, joint partners in a mill, disagreed and referred their dispute to arbitration. Arbitrator decided that *A* should pay *B* certain amount and buy him out by a certain date. *A* paid the amount to the arbitrator, but gave him notice not to pay to *B* as he would take the matter to Civil Court. Civil Court upheld the award and the money was paid to *B* after some years and mill conveyed. *A* sued *B* for mesne profits from the date of deposit with arbitrator to the date of delivery of possession.

Held: that, although the payment to arbitrator was a payment within time under the award so as to extinguish *A's* right to buy out *B*, nevertheless in view of the notice to the arbitrator not to pay the money to *B*, it did not operate as a payment to *B* such as would put an end to the partnership and therefore the partnership subsisted until the money was actually received by *B* and the mill was made over to *A*. (*Heald and Cunliffe, JJ.*) MAUNG TUN MYEIN *v.* MAUNG SEIN YON. **101 I.C. 329= 6 Bur. L. J. 28=A.I.R. 1927 Rang 330.**

PARTNERSHIP—Miscellaneous.

———*Partnership for a fixed term, liable to dissolution after notice—Any other mode of dissolution must be strictly proved.*

Where a partnership has come into existence for a fixed period with a clause enabling one partner to dissolve by giving notice of a specified period to the other, then any other method of dissolution by agreement between the partners must be strictly proved, and where the party on whom the onus of proof lies relies on a document to prove the dissolution and the document can with equal justification be read as having two different meanings then the party fails to satisfy the onus which lay upon him. (*Macleod, C.J., and Coyajee, J.*) RAMANUJACHARY *v.* POHOOMAL BROS. **99 I.C. 495=28 Bom. L.R. 1275= 50 Bom. 665=A.I.R. 1926 Bom. 585.**

———*Partnership continues upto the date of the final decree.*

Where a partnership is dissolved by the death of a partner, and a suit is filed for accounts the business is to be regarded as a continuing business upto the date of final decree. (*Lord Parmoor.*) HAJI HEDAYETULLA *v.* MAHOMED KAMIL. **81 I.C. 525= 22 A.L.J. 382=3 L.R.P.C. 103=19 M.L.W. 425= 34 M.L.T. 69=1924 M.W.N 660= 29 C.W.N. 161=A.I.R. 1924 P.C. 93 (P.C.).**

———*Refusal or neglect to perform duties—Dissolution—How effected.*

Refusal and neglect on the part of any one partner to perform the duties undertaken by him would give to any other partner the right to apply for dissolution or without legal proceedings the partnership could by agreement be dissolved, but for such agreement the consent of all the partners is necessary, otherwise the partnership can come to an end only by effluxion of time. (*Lord Buckmaster.*) W. KRISHNAMACHARIAR *v.* A. SANKARA SAH. **57 I.C. 713= 22 Bom. L.R. 1343=28 M.L.T. 265= 12 M.L.W. 777=33 C.L.J. 1=25 C.W.N. 314= A.I.R. 1921 P.C. 91=39 M.L.J. 257 (P.C.)**

—Winding up.

———*Receiver appointed—Reference to arbitration of any question of liability if could be made.*

Where there is a Receiver in existence winding up the partnership affairs of a firm under the Court, and he has been given full powers to collect all outstandings and to pay debts and to distribute the surplus, it is not possible for the managing partner of the firm to refer to arbitration a question as to whether the firm owes anything to anyone. (*Addison, J.*) FIRM RADHA KISHAN CHUNNI LAL *v.* FIRM ASHA MAL ISHAR DAS. **92 I.C. 705=7 L.L.J. 603= A.I.R. 1926 Lah. 91.**

—Miscellaneous.

———*Death of one partner.*

Where a partnership is continued after the death of one of the partners it is technically a new partnership and not the old partnership. (3 S. L. R. 108 and 7 S.L.R. 85, Foll.) (*Kennedy, J.C., and Lobo A.J.C.*) TANUMAL *v.* GANGARAM. **94 I.C. 547= A.I.R. 1925 Sind 103.**

———*Partnership suit—Patent right involved—Court must decide—Special Court—Duty of*

The Court, which is bound to determine and to determine finally and to dispose of questions arising in

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the partnership suits, cannot shirk its duty in deciding how the partners intended the patent rights to be dealt with, merely because special powers have been given to litigants to apply to another Court. The special Court under the Patent Act would be bound, in deciding any matter in relation to a patent in accordance with the sections of the Patent Act, to decide the controversy with reference to what had been established by the findings of the Court in the dissolution of the partnership which would be binding upon the parties, in any controversy under the Patent Act. (*Walsh, J.*) JWALA PRASAD *v.* RAGHUBIR PRASAD.

70 I.C. 833=A.I.R. 1923 All. 17.

PART PAYMENT.

See LIM. ACT, S. 20.

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See also (1) EVIDENCE ACT, S. 115.
(2) T.P. ACT, Ss. 53-A,54, 58, 107, 116, 119.

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—Applicability.

———*Non-fulfilment of statutory conditions.*

Where the statute makes it imperative that certain conditions must be fulfilled, the non-fulfilment of the conditions cannot be supplied by invoking the doctrine of part performance. (*Sen and Niamatullah, JJ.*) BANK OF UPPER INDIA LTD. *v.* ARIF HUSAIN.

1930 A.L.J. 1157.

———*Right to specific performance barred.*

Held, that the doctrine of part performance was not rendered inapplicable merely because the defendant's right to obtain specific performance of the contract of sale had become barred by limitation on the date of suit. 46 M. 919 (F. B.), relied on. (*Anantakrishna Aiyar, J.*) NAGANNA *v.* APPALARAJU.

1930 M.W.N. 320.

———*Gift by Burmese Buddhist—Subject to discharge liabilities—Doctrine does not apply.*

When a Burmese Buddhist directs one of the heirs to discharge his liabilities which are a good deal less than the value of his properties, and take over his properties, the transaction is equivalent to a gift of the excess of the property over the debt, or a will of that excess, it may be a death-bed gift of that excess. The principle, therefore, of part performance, which applies to a purchaser of the property for consideration has no application to such a case and if such heir discharges the liabilities by selling a portion of the property, he holds the other property on behalf of other heirs. (*Chari, J.*) MAUNG THU *v.* MAUNG SHWE HLA. **A.I.R. 1929 Rang. 272.**

———*Invalid agreement.*

Where there is no valid and binding agreement, principles of part performance are of no avail. (*Chari and Mya Ba, JJ.*) MA NGWE HMON *v.* MAUNG SAN YAUK. **A.I.R. 1929 Rang. 181.**

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———*Ceylon Ordinance 7 of 1840, Cl. 2.*

The doctrine of part performance has no application to the more stringent provisions of Cl. 2 of the Ceylon Ordinance 7 of 1840 by which an agreement as to land not duly attested by a notary and two witnesses is rendered of no force or avail in law. (*Lord Chancellor.*) JOHN H. ARSECUBRATUE *v.* J. B. M. PERERA. **111 I.C. 351=1929 M.W.N. 1= A.I.R. 1928 P.C. 273 (P.C.).**

———*Doctrine cannot override Transfer of Property Act.*

A rule of equity can never be put forward to annual a positive enactment, and so the doctrine of part performance cannot override the provisions of the Transfer of Property Act as regards sale, mortgage, exchange, gift and lease : A. I. R. 1914 P. C. 27 Expl. : 37 Bom. 198 (P. C.) ; A. I. R. 1916 P. C. 139 ; and A. I. R. 1928 P. C. 273; Rel. on. (*Sulaiman. Ag. C.J. and Muker ji and Boys, JJ.*) RAMGOPAL *v.* TULSI RAM. **116 I.C. 861=51 All. 79=26 A.L.J. 952= A.I.R. 1928 All. 641 (F.B.).**

———*Contract to convey by guardian—Possession delivered—Applicability of doctrine against minor.*

The matter cannot be regarded as different even if there was not only a contract by the guardian to convey the property, but, pursuant, to the contract the guardian, by way of partly performing the contract, has placed the other party in actual possession, for the doctrine of part-performance, being an equitable doctrine, can be held to apply to the person concerned, and if the contract is not a contract of the plaintiff who is suing, the equitable principle cannot be invoked against him : A. I. R. 1928 Mad. 407, Rel. on. (*Wallace and Srinivasa Ayyangar, JJ.*) MOOVA NAGESWARA RAO *v.* MANDAVA. **110 I.C. 492= 1928 M.W.N. 214=A.I.R. 1928 Mad. 830.**

———*Transaction void ab initio.*

Where the flaw in the transaction is not a mere defect of form or the absence of some formality normally necessary, but the transaction is one which is void *ab initio*, the doctrine of part performance cannot be applied. (*Findlay, J. C.*) NARAYAN *v.* VITHOBA. **100 I.C. 863=A.I.R. 1927 Nag. 177.**

———*Vendor and Vendee—Third party—Doctrine does not apply to.*

The doctrine of part-performance is one of equitable estoppel and a third party not being privy to the transaction on which the estoppel rests can take no advantage of it. The sale, even in the absence of a registered deed to evidence it, may be an effective sale by reason of the estoppel as a transaction between the vendor and the vendee, but there the estoppel ends. (*Wazir Hasan and Gokaran Nath Misra, JJ.*) MATHURA *v.* UDEBHAN SINGH. **106 I.C. 360= 4 O.W.N. 913=A.I.R. 1927 Oudh 482.**

———*Doctrine applies even as between vendee and third person.*

The application of the doctrine of part performance is not limited to the cases directly between the purchaser and the vendor. Where the purchaser of land has paid the consideration and got possession of the land by virtue of the sale, then, even though no registered deed of sale is executed, a purchaser of the land, in execution of a decree against the vendor, gets no interest in the land. (*Mya Bu, J.*) SIT CHAUK *v.* MANU MAIH. **104 I.C. 361= 6 Bur. L.J. 96=A.I.R. 1927 Rang. 234.**

———*Incomplete executory contracts—Unenforceable Executed contract—Neither party can resile from.*

Where the conduct of the parties creates a situation in which the parties stand upon nothing but an

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engagement which is not final or complete the *locus penitentiae* is not excluded; that is to say, where the parties have given mutual promises but nothing has been done, the consideration is not performed on either side and the contract remains merely executory; then unless it is clothed in the legal forms which make it binding it cannot be enforced against either party by the other, but where parties agreeing not to go to law and not to fight out their disputes but by a mutual arrangement carry into execution their mutual promises so that the original contract by which they decided to terminate the disputes becomes an executed contract on both sides, and nothing remains to be done, the parties continuing each in the enjoyment of the interest which the other agreed that he should take, the Courts in India applying the rule of equity and good conscience will not permit either party who has bound himself both by the contract and by its performance to repudiate what he has done, and will also prohibit any person claiming under him from attempting the same thing. (42 Cal. 801; 14 A. L. J. 449, Foll.) (*Walsh, A. C. J. and Ryves, J.*) MT. KUNTI *v.* GAJRAJ TEWARI. **83 I.C. 297= 22 A.L.J. 779=5 L.R.A. Civ. 568=46 All. 847= A.I.R. 1924 All. 826.**

———The applicability of the doctrine of part performance is not limited to cases where the right to sue for specific performance is not barred on the date of the subsequent suit. (*Phillips and Venkatasubba Rao, JJ.*) VIZAGAPATAM SUGAR DEVELOPMENT CO. LTD., *v.* MUTHURAMA REDDI. **76 I.C. 894= A.I.R. 1924 Mad. 296=45 M.L.J. 826.**

———*Extent of, in India.*

The English doctrine of part-performance applies in India as being a principle of natural justice, *viz.*, to prevent the success of fraud in land transactions. No doubt to establish the application of that principle, it must be shown that the respective parties have so changed their respective positions that the change can only be referable to the contract alleged. 42 I. A. 1; A. I. R. 1921 Bom. 401 Foll. (*Marten and Fawcett, JJ.*) SANDU VALJI *v.* BHIKCHEND SURAJMAL. **75 I.C. 118=47 Bom. 621=25 Bom.L.R. 381= A.I.R. 1923 Bom. 473.**

———The doctrine of part-performance is only applicable where specific performance could have been obtained. (*Woodroffe and Cuming, JJ.*) LAKHI PRIA GUHA *v.* NANDA KUMAR BASU. **84 I.C. 525= A.I.R. 1923 Cal. 345.**

———*Incomplete engagement—Power to resile from—Carried into effect by actings and Conduct—Imperfectly clothed transactions—Rule applies—Test.*

Though a party has complete power to resile from an incomplete engagement, such a power will be denied when the acting and the conduct of the parties have carried the incompletely executed engagement into effect. But in order to exclude the plea of *locus penitentiae*, a party must have his claim, not upon the incompletely executed engagement, but upon the equities that arise from the actings and the conduct of the parties. The equitable rule applies to imperfectly clothed transactions, transactions which in England ought to be evidenced by writing but are not evidenced by writing, which in India ought to be evidenced by a registered document but are not evidenced by registered document, and it is well established that, provided there have been actings and conduct of the parties unequivocally referable to the engagement and productive of alteration of circumstances, loss or inconvenience, a party can found upon the equities arising from the acts done though not upon the engagement itself. (*Das and Kulwant Sahay, JJ*) MAN SINGH *v.* NAWALAKH DATI. **73 I.C. 822=2 Pat. 607=4 P.L.T. 335= A.I.R. 1923 Pat. 492.**

PART PERFORMANCE—Compromise.

———*Exchange of land—Unregistered deed—Plea of invalidity—If avails.*

Where plff. claiming as *heir* of her father sued for joint possession of land on declaration of title and it was proved by the defence that the father had exchanged the suit land for some other land, *held*, that on the equitable doctrine of part performance the plaintiff could not question the validity of the exchange on the ground that it had been effected by an unregistered document. (*Huda, J.*) MEHER ALI *v.* ARBTUNESSA **67 I.C. 167=25 C.W.N. 905.**

—Completed Contract.

———*Omission by mistake—Sale-deed acted upon—Item omitted by mistake—Vendee's title good.*

Where a certain item of property sold is not mentioned in the sale-deed by mistake but the vendor gets the consideration and the sale is acted upon, the mere fact, that due to omission of the property in the deed there is no registered document in respect of that property will not defeat the title of vendee: 42 Cal. 801, Foll. (*Iqbal Ahmad, J.*) KESHO SINGH *v.* ROOPAN SINGH. **100 I.C. 568= A.I.R. 1927 All. 355.**

———*Estoppel—Consideration paid—Proprietary rights transferred, though no deed was executed—Vendor estopped from claiming title.*

Where no written deed is executed but the vendee pays consideration to the vendor who in lieu of the consideration transfers to him full proprietary rights in the premises, the vendee is entitled to invoke to his aid the doctrine of part performance under which the vendor is estopped from claiming any title to those premises as against the vendee and the persons who are claiming as the vendor's heirs, are similarly estopped: A.I.R. 1914 P. C. 27 and *Maddison* v. *Alderson*, (1883) 8 A.C. 473, Rel on. (*Stuart, C.J. and Raza, J.*) MT. HUSNAINI BEGAM *v.* MT. SULTANI BEGAM. **105 I.C. 479=1 L.C. 508= A.I.R. 1927 Oudh 485.**

———*Right to redeem oral sale to mortgagee in possession—Price of sale paid—Right of redemption destroyed.*

Sale though oral and though requiring registration, by mortgagor in favour of the mortgagee, who has got into possession under an oral mortgage and who has paid the price of sale to the mortgagor, will destroy the right of redemption even though the right of the purchaser to sue for specific performance is barred by limitation on the date of the redemption suit. (*Duckworth, J.*) MA MA E. *v.* MG TUN. **84 I.C. 517=3 Bur. L.J. 214=2 Rang. 479= A.I.R. 1925 Rang. 119.**

———*Possession—Vendee already in possession—Purchase money paid—No registered conveyance—Vendor cannot recover.*

When plaintiff agreed to sell certain property to defendants, who were already in possession, and defendants paid up the purchase money, but omitted to take a registered conveyance, plaintiff is not entitled to recover possession, even though the right to obtain specific performance of the agreement to sell had become time-barred. (*Pratt, J.*) MG. SHWE H MON *v.* MG. THA BYON. **72 I.C. 6=11 L.B.R. 462= A.I.R. 1923 Rang. 125.**

—Compromise.

———*Defective or inchoate—Subsequently acted upon—Enforceability.*

Even where a compromise or settlement is defective

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or inchoate and insufficient to make a final and validly concluded agreement, the subsequent acts of the parties may supply all defects. In fact, when the actings and conduct of the parties are founded upon it, as in the performance or part performance of an agreement, the *locus penitentiae*, which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete, is excluded, for equity will support a transaction, clothed imperfectly, in those legal forms to which finality attaches, after the bargain has been acted upon. (*Kanhaiya Lal, J. C.*) RAGHUBAR *v.* RAM BHAROSE.

66 I.C. 412=8 O.L.J. 392=A.I.R. 1922 Oudh 217.

—Essentials of.

———*Writing not essential.*

Writing is not a necessary preliminary condition before the doctrine of part performance could be invoked. That being so, the absence of any writing in connexion with a ryoti land exchange is not a valid objection. (*Ananthakrishna Ayyar, J.*) PUTTA CHELAMIAH *v.* VENKATA KUMARA MAHIPATI SURYARAO BAHADUR GARU.

121 I.C. 765=A.I.R. 1930 Mad. 1.

———*Actings of parties referable to agreement.*

An essential condition for the application of the doctrine of part performance is that there are such actings of the parties as must be unequivocal and in their own nature referable to the agreement alleged: 1 P. L. T. 354, Foll. (*Fazl Ali and Chatterji, JJ.*) MT. RAMJHARI KUER *v.* GOKUL SINGH.

123 I.C. 408=11 P.L.T. 398=A.I.R. 1930 Pat. 61.

———*Change in the position of parties referable only to the contract.*

The doctrine of part performance is only applicable in cases where it is found that the parties have so changed their respective positions that the change can only be referable to the alleged contract: A.I.R. 1923 Bom. 473, Foll.

The underlying principle is, both sides by their conduct must have shown that, although the documents of title are void for want of registration, yet the transaction has been acted upon. (*Fawcett and Madgavkar, JJ.*) SATYADHYANTIRTH *v.* RAGHUNATH.

96 I.C. 827=28 Bom.L.R. 743=A.I.R. 1926 Bom. 384.

———*Acts alleged to constitute, must be referable to contract alone.*

To make the acts of part performance effective they must be consistent with the contract alleged and also such as cannot be referred to any other title than a contract, nor have been done with any other view or design than to perform a contract.

Plaintiff sold his house to defendant but remained in possession as tenant of defendant. There was an agreement between the parties to resell the house to plaintiff if the price was paid within a certain date. No payment was made but plaintiff continued in possession and defendant accepted rent of period even after the date fixed for payment.

Held: that the act of continuing in possession was not an act of part-performance referable to the contract of re-sale alone. (*Ramesam, J.*) DAKSHINAMURTHI MUDALIAR *v.* DHANAKOTI AMMAL.

87 I.C. 552=A.I.R. 1925 Mad. 965=48 M.L.J. 661.

———Essentials of doctrine of part performance are given in detail. (*Wazir Hasan and Pullan, A. J. Cs.*) BANSI DHAR *v.* AJUDHIA PRASAD.

82 I.C. 333=27 O.C. 175=11 O.L.J. 619=A.I.R. 1925 Oudh 120.

PART PERFORMANCE—Failure of Registration.—Exchange.

———*Oral agreement—Actual exchange—Parties in possession since—Doctrine applies.*

Where in pursuance of an oral agreement there has been an actual exchange of land and the parties have remained in possession ever since that date without any question being raised, the doctrine of part performance applies, and, therefore, the bar under S. 54, Transfer of Property Act, is in reality removed: A.I.R. 1923 Bom. 473, Foll.: 40 Mad. 1134 (F.B.), Not Foll. (*Marten, C. J. and Crump, J.*) DADA VAKU *v.* BAHIRU.

105 I.C. 754=29 Bom. L.R. 1419=A.I.R. 1927 Bom. 627.

—Evidence.

———*Verbal contract—When provable.*

If there is a part performance by a party seeking relief proof will be admitted of the verbal contract in cases where an action for specific performance would lie: 4 P.L.T. 657, Foll. (*Fazl Ali and Chatterji, JJ.*) MT. RAMJHARI KUER *v.* GOKHUL SINGH.

123 I.C. 408=11 P.L.T. 398=A.I.R. 1930 Pat. 61.

———*Unregistered agreement of sale—Admissibility.*

Where there was parol evidence of an agreement for sale and evidence was reinforced by the fact that the person producing an unregistered document to prove an agreement of sale, was in possession of that land and was also paying Government revenue,

Held: that there is no illegality in making use of that document: 18 C. W. N. 445, Ref. (*Mullick and Garlick, JJ.*) HEMESWER BARVA *v.* POOLCHANDRA BORA.

116 I.C. 370=A.I.R. 1928 Cal. 754.

———*Oral evidence—Facts referable to contract and productive of change in the nature of possession—Admissibility.*

A. brought a suit for a declaration that certain land was liable to be attached in execution of his decree against P. During the trial of that suit it transpired that P. had at first mortgaged the land with possession to N. and her husband, by a registered deed and had later sold it outright to the mortgagees by a *pyatpaing* and without any registered instrument. It was contended on behalf of A. that no oral evidence was admissible to prove the sale;

Held: that oral evidence could be offered of facts which were referable to the contract of sale and productive of a change in the nature of possession. It is not correct to say that to apply the doctrine of part performance, possession must have been given under the contract of sale and could be referred to no other title; A.I.R. 1924 Rang. 214 (F. B.); A.I.R. 1927 Rang. 33 (F.B.); A.I.R. 1925 Rang. 119; A.I.R. 1923 Rang. 125; A.I.R. 1922 Bom. 9; S. A. No. 89 of 1923; A.I.R. 1914 P.C. 27; A.I.R. 1928 Rang. 182; Special Second Appeal No. 104 of 1927; and A.I.R. 1927 Rang. 33 (F.B.); Discussed and Rel. on; and Rang. S.A. 308 of 1923. Diss. from. (*Heald and Maung Ba, JJ.*) C.A.M.K.R. CHETTIAR *v.* MA KYAW.

110 I.C. 616=6 Rang. 270=A.I.R. 1928 Rang. 321.

—Failure of Registration.

———*Sale acted upon—If can be impeached.*

Where a member of a joint family conveys a portion of the property belonging to him to another member of the family in lieu of consideration and the transaction has been followed up by the actions of the parties, it is not open to any impeachment by reason of the absence of a registered instrument to support the transaction, such a transaction is fully supported by the doctrine of part performance. (*Sen and Niamatullah, JJ.*) BANSI LAL *v.* MT. MUNDER.

122 I.C. 410=1930 A.L.J. 638.

PART PERFORMANCE—Failure of Registration.

———*Document inadmissible for want of registration—Doctrine cannot be invoked.*

Where a document which ought to be registered under S. 59, T. P. Act, has not been registered and is consequently not admissible in evidence under S. 17 and 49, Registration Act, the doctrine of part performance cannot be invoked to make the document admissible : A.I.R. 1914 P.C. 27, Dist. ; A.I.R. 1928 All. 641 (F.B.), Rel. on. (*Young, J.*) NANNHUN *v.* HALKA. **A.I.R. 1930 All. 175.**

———*Vendee's failure to register sale-deed—Previous agreement of sale plus present possession—Doctrine cannot give relief.*

In a suit for declaration of title and possession, a vendee, who first relies on a sale-deed, which he has finally failed to get registered under Registration Act, S. 77 and next relies on an agreement of previous date to the sale-deed, plus his present possession, is not entitled to any relief by the application of the doctrine of part pertormance. There is nothing on the conscience of the vendor who has done all that he was required to do to carry out his part of the transaction. The vendee failed to carry out in failing to get, either through some fault or misfortune of his own, the sale-deed registered. Under these circumstances the vendee is not entitled to be put in the same position as if the sale-deed never existed and to insist on the doctrine of part performance. The vendee has no equities, nor has he an equitable title. (Case-law-discussed). (*Odgers and Curgenven, JJ.*) VENKATARATNAM *v.* GURAVAYYA. **121 I.C. 18=A.I.R. 1930 Mad. 84.**

———*S. 107, T. P. Act and S. 17, Registration Act—Imperative—Doctrine cannot override.*

The provisions of S. 107, T. P. Act, and S. 17, Registration Act, are imperative and cannot be overridden by the equitable doctrine of part performance as this doctrine can be of no avail when there has been a violation of a provision of law: A. I. R. 1928 All. 641, (F.B.), Rel. on. A.I.R. 1923 Cal. 63, not Foll. (*King and Iqbal Ahmad, JJ.*) BAIJ NATH *v.* KUNDAN LAL. **1929 A.L.J. 1134=A.I.R. 1929 All. 831.**

———*Unregistered deed—Shares separately enjoyed—Doctrine applies.*

Although an unregistered partition-deed is inadmissible in evidence, still if there has been division and separate enjoyment of shares by the parties, the partition will be given effect to by applying the doctrine of part-performance. (*Kumaraswami Sastri and Reilly, JJ.*) RAMAKRISHNAYYA *v.* SATYANARAYANA. **116 I.C. 137=A.I.R. 1929 Mad. 291.**

———*Family settlement—No binding oral arrangement—Writing not registered—Possession and mutation—Absence of registration not cured.*

Where there is no legally binding oral family arrangement, or the arrangement, though reduced to writing with the intention that the document should be the document of title, cannot be proved for want of registration, and where no question of estoppel arises, the mere facts that mutation has taken place and that possession has been taken cannot, by virtue of what is known as the doctrine of part performance, remedy the absence of registration: 31 All. 73 (P.C.) Rel. on. (*Sulaiman, Ag. C. J., Muker ji and Boys, JJ.*) RAM GOPAL *v.* TULSI RAM.

116 I.C. 861=26 A.L.J. 952=51 All. 79=A.I.R. 1928 All. 641 (F.B.)

———*Unregistered sale-deed—Possession given—Ejectment—Equitable defence avails.*

Where plaintiff sells his land to defendant, and taking purchase money gives defendant possession, but the sale-deed is not registered the plaintiff will be prevented from suing afterwards to eject defendant, for although title did not effectively pass to the defendant the sale-deed not having been registered, still the actings of parties would create an equitable defence against such a suit of the plaintiff: A. I. R. 1914 P. C. 27 Foll. (*Sir George Claus, J., Rankin, Kt. C. J. and Mukerji, J.*) SONA MIYA *v.* AJOR ALI. **114 I.C. 416 (Cal.)**

PART PERFORMANCE—Failure of Registration.

———*Unregistered deed—Items separately enjoyed—Partition could be given effect to.*

Even if the terms of the partition cannot be proved, the deed of partition being inadmissible for want of registration, if there is later enjoyment of certain items as separate property such enjoyment amounts to partial performance of the contract of partition and its terms; and in such a case the partition can be given effect to by reason of its partial performance even though the terms of the partition as it took place at the time cannot be proved. (*Ramesam, J.*) AHOBILACHARIAR *v.* THULASI AMMAL. **103 I.C. 281=39 M.L.T. 276=A.I.R. 1927 Mad. 830.**

———*Unregistered deed of relinquishment—Possession and consideration passed—Valid defence.*

A legatee sued for recovery of certain immovable property bequeathed to him. The defendant in possession of the estate relied upon an unregistered document by which the plaintiff received a cash consideration for the lands and relinquished his rights and agreed to re-convey the lands.

Held : that though the sale-deed contemplated was not executed, part performance of the agreement by payment and acceptance of the consideration was a valid defence to the claim of the plaintiff: A. I. R. 1924 Mad. 271 (F.B.) Foll. (*Spencer and Ramesam, JJ.*) NUNNIE GADDA SESHAYYA *v.* CHERUKURY MEENAKSHAMMA. **98 I.C. 631 (Mad.)**

———*Contract invalid for want of registration—Parties acting under it—Any party entitled to equities arising from the contract.*

Where a contract is invalid for want of registration but both parties do acts which are in part performance of that contract, and are referable to nothing else, then by virtue of the doctrine of part performance any party to it is entitled to an enforcement of the equities arising out of those acts of the parties and for that purpose to have the contract regarded. (*Hallifax and Kotwal, A. J. Cs.*) SETH GOKULDAS NATHAM *v.* LAL ARTATRAN. **95 I.C. 824=A. I. R. 1926 Nag. 466.**

———*Unregistered document—Transferee given possession—Transferor cannot recover.*

The defendants advanced some claims to the property in the possession of the plaintiff. The plaintiff agreed, in consideration of the defendants giving up these claims, to transfer to the defendants the lands in dispute and executed a document. Acting on the document the defendants took possession of the property and for nearly 10 years before the suit was filed they were in possession of the property.

Held : that though the deed was not registered the plaintiff could not claim back the lands. (*Venkatasubba Rao, J.*) A. JOGAMMA *v.* L. POTHAMMA. **88 I. C. 903=1925 M. W. N. 159=A.I.R. 1925 Mad. 763=48 M. L. J. 287.**

———Where an agreement resulted in certain entries in mutation proceedings which were subsequently set aside, such a case is emphatically not one in which lack of registration can be made good by a long continued observance of the terms of the agreement. (*Pullan, A. J. C.*) NAND KUMAR *v.* BABU RAM. **83 I. C. 193=11 O. L. J. 574=28 O.C. 65=A.I.R. 1925 Oudh 168.**

PART PERFORMANCE—Failure of Registration.

——*Unregistered, but acted upon—Binding nature of.*

Transactions which do not purport to comply with statutory requirements, *e.g.*, the formality of Registration law, although in every other way the object to be achieved by the transfer or exchange has been executed can be recognised in law or rather at equity, so as to bind the parties by their conduct so irrevocably as to make it impossible for them to reopen the transactions or retrace their steps. (42 Cal. 801 P. C. and 40 All. 187, Foll.) (*Walsh, Ag. C. J. and Ryves, J.*) H. HUNTER *v.* DAMODAR DAS. **81 I.C. 508= 46 All. 759=22 A.L.J. 719=5 L.R.A. Civ. 518= A. I. R. 1924 All. 772.**

———*Unregistered but acted upon.*

Where an agreement has been acted upon and parties, have enjoyed benefits thereunder, neither party can be allowed to resile from the agreement although it may be unregistered. (*Piggott and Kanhaiya Lal, JJ.*) BALDEO SINGH *v.* UDAL SINGH. **43 All. 1=A.I.R. 1921 All. 248.**

———*Agreement to sell on plain paper—Possession of part given—Unregistered sale-deed for the rest—specific performance.*

Defendant agreed to sell to the plaintiff two pieces of lands and a house. The agreement was reduced to writing on a plain paper. Plaintiff was put in possession of the lands : the house was conveyed by the defendant's passing a deed of sale on a stamped paper, but the sale-deed was not registered, nor any sale-deed of the lands was ever passed. Agreement to sell also was not brought on record. In a suit by plaintiff for specific performance of the agreement by ordering the defendant to execute a sale-deed in respect of the lands and to deliver up possession of the house.

Held, that as the agreement had been partly performed by placing the plaintiff in possession of two pieces of lands the plaintiff was entitled to call upon the defendant to execute a deed of sale of the lands and the house and to the delivery of possession of the house, and that inasmuch as the written agreement of sale was not on a stamped paper, it was not open to the plaintiff to adduce secondary evidence of it even upon payment-of penalty. 23 Mad. 49 (P. C.) Foll. (*Macleod, C. J. and Shah, J.*) HIRALAL RAMNARAYAN *v.* SHANKAR HIRACHAND. **62 I.C. 637= 45 Bom. 1170=23 Bom. L.R. 506= A.I.R. 1921 Bom. 401.**

—Gift.

———*Doctrine—No application to donees.*

The doctrine of part performance on which it is held that a vendee in possession who has paid consideration but has not obtained a registered conveyance cannot be ousted by the vendor or a person claiming under the vendor has no application to the case of the donee : A. I. R. 1924 Rang. 200 and A, I. R. 1924 Rang. 102, Cons. (*Chari, J.*) MAUNG HLA MAUNG *v.* MAUNG PO HTAI. **A.I.R. 1929 Rang. 316.**

———*By way of sankalap at marriage—Application of doctrine.*

The doctrine of part performance, which has in certain English cases been applied to pre-nuptial settlements in consideration of marriage, cannot be applied to a gift by way of sankalap at the time of the marriage, which is a sacrament and not the outcome of a contract : A. I. R. 1928 All. 641, Appl. (*Sen and Weir, JJ.*) HIRA MANI SINGH *v.* ANMOL SINGH. **117 I.C. 351=26 A.L.J. 944=A.I.R. 1928 All. 699.**

———*Agreement to make a gift.*

An agreement to make gift not being capable of specific performance the doctrine of part performance has no application to it. (*Madgavkar and Patkar, JJ.*) MIRALAL CHIMANLAL *v.* GAURI SHANKAR. **109 I.C. 149=30 Bom.L.R. 451= A.I.R. 1928 Bom. 250.**

PART PERFORMANCE—Lease.

———*Proposed lessee enjoying without paying rent—Specific performance—Enforceability.*

The proposed lessee entered on the land in pursuance of an agreement to grant a lease and not only cleared the jungle but also made bricks for over a year without any other lease. He enjoyed in full the profits of the land without paying the lease money.

Held: in a suit for rent that there has certainly been part-performance by the lessor of the contract and it is a contract fit to be specifically enforced, especially when a suit for specific performance was not time barred at the time when the suit was instituted. (*Mullick and Garlick, JJ.*) KANTICHANDRA *v.* BROJENDRA MOHAN. **116 I.C. 630=49 C.L.J. 12= A.I.R. 1929 Cal. 186.**

———*Registered lease not obtained—Suit in ejectment—Lessee in possession and building on the land—Acquiescence by lessor—Good defences.*

Where a person does not obtain a lease executed and registered in conformity with the provisions of the law, he cannot resist ejectment, unless the case may be brought within the range of one or other of the principles of equity established in *Maddison* v. *Alderson* (where there is parol contract and such performance of it as unequivocally refers to the contract, equity will charge the party with acts done its execution of the contract) or in *Walsh* v. *Landsdale* (enforceable right of specific performance of contract is a good defence to an action for the ejectment.)

In 1913 the landlord contracted to grant a permanent lease in respect of certain land. No formal lease was executed under the terms of S. 107, T. P. Act. Pursuant to the contract the tenant obtained possession of the land and erected permanent and costly structures thereon. The landlord was aware of the erection of those structures and must have realized that the tenant would not have constructed such a building unless he was assured of the possession of a permanent right in the land. In December 1918 the landlord gave notice to the tenant of his refusal to specifically perform the contract. The landlord in 1923 brought a suit for ejectment against the defendant.

Held ; there was part performance of the contract on the part of the landlord in the shape of the delivery of possession of the land. The landlord would not succeed in his suit for ejectment as he would be unable to displace the tenant's possessory title by reason of the equities arising out of the executant contract blocking his way. Notwithstanding, therefore, that the right of the tenant to enforce performance was barred at the date of the suit, landlord's performance afforded a good defence to the action for ejectment. *Maddison* v. *Alderson*, (1883) 8 A. C. 473 Foll. ; A. I. R. 1914 P. C. 27 ; A. I. R. 1916 P. C. 9 ; 40 All. 187 ; A. I. R. 1923 All. 433 ; A. I. R. 1923 Bom. 473 ; and A. I. R. 1924 Mad. 271 (F. B.); Rel. on. ; *Walsh* v. *Landsdale*, (1882) 21 Ch. D. 9, not Appl.

Held further : that the landlord having allowed the tenant to erect structures on his land would not be allowed to eject the tenant as he acquiesced in tenant's conduct : *Ramsden* v. *Dyson*, (1866) 1 H.L. 129 and *Gregory* v. *Mighell*, (1881) 18 Ves. 328 Foll.; 21 All. 496 (P. C.). Dist.; 28 Cal. 693 (P.C.) and A. I. R. 1925 P. C. 146 Rel. on. (*Mukerji and Graham, JJ.*) G. H. C. ARIFF *v.* JADUNATH MAJUMDAR. **112 I.C. 865=55 Cal. 1090= 33 C.W.N. 333=A.I.R. 1929 Cal. 101.**

PART PERFORMANCE—Lease.

———*Oral contract of lease—Lessee in possession—Lessor giving notice of refusal to perform his contract—Suit for specific performance after efflux of time—Maintainability.*

Where a tenant is in possession of certain land by virtue of an oral contract of permanent lease, which, however, is not reduced to writing and registered, and where the landlord afterwards has given notice of refusal to perform his part of contract, the tenant cannot sue for specific performance of contract by requiring landlord to execute a formal lease after efflux of time since the notice has barred his suit. It is not sufficient to say that the original contract was specifically enforceable. *Walsh* v. *Landsale*, (1882) 21 Ch. D. 9, Expl. 16 C.L.J. 217 and 17 C.L.J. 167, Ref. (*Mukerji and Graham, JJ.*) G. H. C. ARIFF *v.* JADU NATH MAJUMDAR. **112 I.C. 865=55 Cal. 1090=33 C.W.N. 333=A.I.R. 1929 Cal. 101.**

———*Unregistered lease—Tenant in possession—Suit for rent—If lessee could resist.*

A tenant entered into the possession of certain lands under an unregistered contract of lease. The landlord sued to recover the rent as fixed by the lease. It was contended on behalf of the tenant that the lease not being admissible in evidence the landlord could not recover the rent.

Held: that the tenant independently of the lease was liable to pay compensation to the landlord for use and occupation of the land.

Held: further that the parties having acted on the unregistered lease the doctrine of part performance applied and the defect of non-registration was cured: A. I. R. 1914 P. C. 27, Rel. on. (*Wazir-Hasan and Nanavutty, JJ.*) RAGHUBAR DAYAL *v.* SHEO BAKSH SINGH. **110 I.C. 875=A.I.R. 1928 Oudh 479.**

———*Proof of.*

A lease deed invalid for want of registration can be proved by the doctrine of part performance. (*Das and Kulwant Sahay, JJ.*) DAMODAR PRASAD *v.* MASOODAN SINGH. **105 I.C. 172=8 P.L.T. 829=A.I.R. 1928 Pat. 89.**

———*Unregistered lease by authorized agent—Possession given—Lease cannot be avoided.*

Where the manager of the plaintiffs asked for their consent to grant a lease for five years and got the permission in a very definite form from the plaintiffs by a letter authorizing him to grant the lease and the lessees were inducted into actual possession.

Held: that the plaintiffs cannot be allowed to succeed against their own nominees to avoid the lease simply because the document which was given by their agent to the lessee did not comply with the provisions of S. 49 of the Registration Act (*i.e.*, not registered) as it would be most inequitable. (*Bucknill and Macpherson, JJ.*) PEARI DAI *v.* NAIMISH CHANDRA. **90 I.C. 822=5 Pat. 40=7 P.L.T. 183=A.I.R. 1926 Pat. 184.**

———*Oral lease—Lessee in possession—Ejectment.*

A lessee in possession under an oral agreement for lease requiring a registered deed for its validity cannot be ejected by the lessor on the ground of want of title. (*Carr, J.*) MAUNG CHAN E *v.* AH TIT. **84 I.C. 356=3 Bur. L.J. 201=A.I.R. 1925 Rang. 118.**

———*Agreement to lease—No document executed—Lessee put in possession—Doctrine applies—Exception.*

If there is an agreement to grant a lease and the intended lessee takes possession thereunder though the requisite legal document has not been executed and registered the parties are in the same position as if the documents have been executed provided specific performance can be obtained between the parties to the agreement. An exception is made in cases where no definite period was fixed for performance of the agreement of where the party had been lulled into security. (*Chatterjee and Cuming, JJ.*) PITAMBAR GAIN *v.* RAMCHARAN MORAL. **76 I.C. 365=28 C.W.N. 157=A.I.R. 1924 Cal. 483.**

PART PERFORMANCE—Mortgage.

———*Enforceable agreement of lease—No deed—Position of parties.*

Where B agrees to let land to A who takes possession, and the agreement is one of which specific performance would be granted, A and B have the same legal rights and liabilities as between themselves, as if a lease had been executed, provided the rights of third parties are not affected. (*Mookerjee, Ag. C. J. and Fletcher, J.*) AMINULLA CHOWDHURY *v.* MAHABAT ALI. **60 I.C. 457=25 C.W.N. 715=A.I.R. 1921 Cal. 519.**

—Mortgage.

———*Mortgagee in possession—Agreement to sell by two Hindu brothers—Alienee from third brother—Right to redeem.*

Where two out of three Hindu brothers entered into an agreement to sell the entire property to the mortgagee in possession, mortgage being executed by their father, and a suit for redemption was filed by the alienee from the third brother for redeeming the entire property,

Held: that possession coupled with the agreement to sell will ordinarily be a good defence in respect of the two-thirds share of the vendors and that it was not necessary that the agreement at the time of defence should be capable of specific performance; it may even be barred; and further that the plaintiff was entitled to redeem only the one-third share: A. I. R. 1914 P.C. 27; A. I. R. 1924 Mad. 271 (F. B.); and A. I. R. 1924 Bom. 150, Foll. (*Madgavkar and Patkar, JJ.*) RAMAPPA *v.* YELLAPPA. **109 I.C. 532=52 Bom. 307=30 Bom.L.R. 427=A.I.R. 1928 Bom. 150.**

———*Mortgagee in possession—Oral sale—Redemption by mortgagor's heirs—Sale, a good defence.*

A mortgagor mortgaged with possession certain property in 1900 with the mortgagee. The mortgagor subsequently sold the mortgaged property to the mortgagee in 1907. More than 12 years after 1907 the mortgagor's heirs brought a suit for redemption. The trial Court decreed the claim holding that the oral sale having taken place after 1905, when the Transfer of Property Act came into force, could not be proved.

Held: that the agreement to sell was a good defence to the redemption suit. Besides the mortgagee's possession had been adverse for over 12 years and the mortgagee had acquired title by prescription: Second Appeal 299 of 1924, Foll.: A.I.R. 1927 Rang. 33 (F. B.); A. I. R. 1924 Rang. 214 (F. B.); and 10 L.B.R. 241, Considered. (*Heald and Darwood, JJ.*) MAUNG PO SIN *v.* MA NYEIN. **110 I.C. 610=6 Rang. 276=A.I.R. 1928 Rang. 182.**

———*Deed not registered—Consideration passed—Contract enforceable.*

Where good consideration has been given and received, but the transfer has not been completed in a manner which the law can recognise because the deed of transfer has not been registered in the manner permitted by the law, the parties stand upon a parol contract to mortgage the land with possession and that contract having been completely performed on both sides as to everything except conveyance, the contract is not a nullity and Courts should give effect to it:

PART PERFORMANCE—Mortgage.

A. I. R. 1927 Oudh 162, Foll. (*Stuart, C. J. and Raza, J.*) UDAIRAJ SINGH *v.* SHANKARA SINGH.

105 I.C. 718=4 O.W.N. 1015= A.I.R. 1927 Oudh 570.

———*Simple mortgage—Subsequent transfer of possession to mortgagee without document—Plea of invalid sale if sustainable.*

Where there is a registered simple mortgage of land and a subsequent transfer of possession of the land to the mortgagee without a document by the mortgagors, and the latter assert that this was under the original mortgage, whilst the former plead that it was a fresh transaction amounting to an outright, but invalid, sale to them, the mortgagee can, in a suit by the mortgagors for redemption of the mortgage, plead and prove this invalid sale in equity and as a shield : Civ. App. 299 of 1924 and A. I. R. 1924 Rang. 214 (F. B.), Affirmed ; A. I. R. 1923 Rang- 125, Rel. on ; A. I. R. 1925 Rang. 291 (F. B.), Foll. ; A. I. R. 1924 Rang, 214 (F.B.). Appr : 89 I.C. 875=A. I. R. 1925 Rang. 322= 3 Rang. 243, Overruled: (*Rutledge, C.J. Heald, Carr, and Duckworth, JJ.*) MAUNG OK KYI *v.* MA PU.

99 I.C. 519=4 Rang, 368=5 Bur. L.J. 145= A.I.R. 1927 Rang. 33 (F.B.).

———*Simple mortgage—Subsequent oral agreement of Sale—Mortgagee entering possession under applicability of doctrine.*

The equitable doctrine of part-performance is not available to a mortgagee who enters into possession under a subsequent oral agreement for a sale of the mortgaged property to him except in very exceptional circumstances. (1 Rang. 419 Ref.), because that doctrine is only applicable when all the requisite conditions are present. One of the conditions is that the possession or other acts of part performance relied on "must be not only referable to a contract but must be referable to no other title." 42 Cal. 801 (P.C.) Ref.

It is only in very rare cases that the possession of the mortgagee who had entered under an oral agreement for sale would be accompanied and followed by additional acts and conduct of both parties of such a nature as to put his possession in the position of being " referable to no other title than the oral agreement " or " unequivocally referable to the contract." In such cases the possession of the mortgagee would ordinarily be referable to his mortgage, or in the case of a simple mortgage, to his influence over the mortgagor by reason of such mortgage and consequently to the mortgagee. (*Lentaigue, J.*) MAUNG MYAL TUN AUNG *v.* MAUNG PU LU.

89 I.C. 875=3 Rang. 243= A.I.R. 1925 Rang. 322.

———*Invalid usufructuary mortgage—Loan made —Right of mortgagee—Applicability of doctrine.*

The doctrine of part performance should be applied to an invalid usufructuary mortgage when the loan has actually been made and therefore the agreement to mortgage is specifically enforceable by compelling the borrower to execute a valid deed of mortgage or to repay the loan but no charge is created on the property.

Where A took a loan from B and handed over a certain land to B as security therefor by way of usufructuary mortgage but where no registered deed was executed and the land was subsequently sold by A to C who knew of A's transaction with B :

Held : in a suit for possession by C against B that B could retain the land till the debt was repaid though no charge was created by the invalid usufructuary mortgage. (*Lentaigne and Carr, JJ.*) MAUNG TUN YA *v.* MAUNG AUNG DUN.

PART PERFORMANCE—Scope of.

84 I.C. 1023=3 Bur. L.J. 130=2 Rang. 313= A.I.R. 1925 Rang. 1.

———*Possession mortgage—Subsequent oral sale to mortgagee—Doctrine inapplicable—Reason.*

After a mortgage with possession under a registered deed the mortgagor sold the property to the mortgagee for a further consideration but without any document.

Held, the doctrine of part performance laid down in 3 B.L.J. 78 that possession must be given under the transfer and should be referable to no other title was not complied with in this case and hence the mortgagor was entitled to redeem. (*Carr, J.*) MA SHWE KIN *v.* KA HEE. **84 I.C. 514=3 Bur. L.J. 211= A.I.R. 1924 Rang. 381.**

———*Contract to mortgage—consideration had and possession given—Right of promisee to retain possession.*

A person who has advanced money on the strength of a promise to mortgage land and who has actually received possession of the land as part of his security for the money advanced cannot be ousted from that possession by the person who made the promise and put him in possession of the land or by any other person claiming under him with notice of the payment, *i.e.*, he has a charge or lien on the land so promised to be mortgaged to him. (*Heald, J.*) AUNG DUN *v.* MAUNG TUN YA. **76 I.C. 508=1 Rang. 261= A.I.R. 1923 Rang. 222.**

—Relinquishment.

———*No registered deed of—Acted upon for a long time—Transaction upheld.*

Although a surrender of the equity of redemption in immoveable property worth over Rs. 100 could not have been made except by a registered instrument, equity will support the transaction after it has been acted upon by the parties for a long time.

Where the mortgagee got possession by virtue of the surrender in tacit recognition of the validity of the previous foreclosure proceedings and enjoyed the same in his capacity as a purchaser or proprietor, *Held* : that the mortgagor's title is extinguished on the principle that the *locus penitentiae* which exists when the parties stand on nothing but an engagement which is incomplete is excluded where the parties have acted thereon. (*Kanhaiya Lal, J. C.*) BASHIR HUSAIN *v.* CHANDRAPAL SINGH. **68 I.C. 223= 25 O.C. 83=10 O.L.J. 1= A.I.R. 1922 Oudh 133.**

—Scope of.

———*Doctrine only used to complete intended transfer—Not operative against third persons.*

The doctrine of part-performance is only used to complete an intended transfer between the transferor and the transferee, where there is no other objection to complete the transaction ; it cannot be used to complete a transaction against a third person such as the idol of a temple of a *cestui que* trust or a minor against whom it cannot be regarded as operative. (*Ramesam and Jackson, JJ.*) SUBBA RAO *v.* VEERANJANEYASWAMI.

A.I.R. 1930 Mad. 298.

———*Doctrine, an extension of the rule of estoppel —Lies between a right to specific performance and a right on perfected title.*

The doctrine of part performance is an extension ot the rule of estoppel, which may form a valid plea to resist an action in which the title of the defendant was not founded upon a completed contract. Where there is a mere executory contract the remedy of the party aggrieved is by a suit for specific performance of the contract instituted within the period of limitation. In the case of a completed contract where all the formali-

PART PERFORMANCE—Scope of.

ties required by law have been duly fulfilled, the case of the party rests upon a perfected title. In between these two stages, comes part performance. (*Sen and Weir, JJ.*) HIRA MAMI SINGH *v.* ANMOL SING. **117 I.C. 351=26 A.L.J. 944= A.I.R. 1928 All. 699.**

———*Based on acts done and not on mere contract—Equities arising—Applicability in India.*

Indian Court must give effect to the equitable doctrine which is generally known as the doctrine of part performance. Put generally and broadly, despite the provisions of the Statute of Frauds or any other statute, which requires the execution of a written document or conveyance to support title, the Courts are permitted to consider the equitable consequences of a part performance of a parol contract concerning land.

In a suit founded on such part performances, the defendant is "really charged" upon the equities resulting from the acts done in execution of the contract, and not upon the contract itself.

Obiter : The principles are principles largely of estoppel, and principles that the Court may proceed upon 'equities' resulting from the acts done in execution of a contract and not upon the contract itself. (*Stuart, C. J. and Raza, J.*) MT. BISMILLA BEGUM *v.* MOHAMMAD ALI MOHAMMAD KHAN. **102 I.C. 77= 4 O.W.N. 360=A.I.R. 1927 Oudh 162.**

———*Tenant in possession—Mere continuance in possession after agreement—Applicability of doctrine.*

Ordinarily when the tenant is in possession at the date of the parol agreement merely continuing in possession does not of itself amount to part performance. But where the possession commences before the agreement but continues after the agreement has been entered into but with unequivocal reference to the agreement such possession might be considered as part performance. (*Chatterjee and Cuming, JJ.*) PITAMBAR GAIN *v.* RAMCHARAN MORAL.

76 I.C. 365=28 C.W.N. 157=A.I.R. 1924 Cal. 483.

——— When in pursuance of an agreement to transfer property the intended transferee has taken possession though the requisite legal documents had not been executed and registered, the position is the same as if the documents had been executed, provided specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined : 24 C.W.N. 463 Foll. ; 29 Mad. 336 not Appr.; A.I.R. 1924 Mad. 271 and A.I.R. 1914 P.C. 27 Ref. (*Wort and James, JJ.*) RAGHUNATH BHAGHAT *v.* SUKAN. **123 I.C. 799=11 P.L.T. 478= A.I.R. 1930 Pat. 53.**

See also *Chimasbani* v. *Venkatrao.* **92 I.C. 841= 8 N.L.J. 135=A.I.R. 1926 Nag. 79.**

Haripada v. *Nirod Krishna Ghosh.* **61 I.C. 687= 33 C.L.J. 437=A.I.R. 1921 Cal. 383.**

Jogendra Krishna Roy v. *Kurpal Harshi and Co.* **68 I. C. 993=35 C.L.J. 175=49 Cal. 345= A.I.R. 1923 Cal. 63.** and

Gajendra Nath Dey v. *Moulvi Ashroff Hussain.* **69 I.C. 707=36 C.L.J. 48=27 C. W. N. 159= A.I.R. 1923 Cal. 130.**

—Specific performance.

———*Consent to release not free—Consideration nominal—Neither specific performance nor equities arising from the doctrine could be given effect to.*

K, 9 or 10 days before his death told his children by first wife to give certain property to his second wife *K* in lieu of her share in the estate. *K* expressed her consent to this and accepted the property from the children 2 or 3 days after *N*'s death allowing it to be understood that she would not make any further claim to the estate. The property that *K* received was a little more than a nominal consideration having regard to her share in the estate. The children relied on the release and contended that *K* was not entitled to claim anything.

Held further : that the contract was so inequitable that no Court would pass a decree for specific performance thereof in favour of children, nor could the doctrine of part performance or any of the equities arising therefrom could be applied in their favour and *K* could not be bound by the contract. (*Brown and Chari, JJ.*) TAFUZZAL AHMAD *v.* MAUNG SHWE KYI. **A.I.R. 1929 Rang 335.**

———*Contract to transfer—Partly performed—Estoppel as to title—Claim to specific performance barred—Doctrine does not apply.*

Where a contract for the transfer of immovable property is partly performed, the rightful owner is estopped in a suit for recovery of possession from setting up his own title by reason of the contract which had been performed in part. But the doctrine of part performance will not apply where the right to claim specific performance of the contract is barred. *Case law discussed.*

However, the estoppel arising out of the equitable doctrine of part performance will not create title in the plaintiffs if otherwise they had none, and where the plaintiff seeks to recover possession on the strength of his title, he cannot succeed when there has been no transfer by a registered deed such as is necessary under S. 54, T. P. Act. (*Greaves and Mukerji, JJ.*) KABPADA BASU *v.* FORT GLOSTER JUTE MANUFACTURING CO. **100 I.C. 866=31 C.W.N. 348= A.I.R. 1927 Cal. 365.**

———*Inchoate sale and inchoate mortgage—Distinction in the remedy available.*

There is a marked distinction between cases relating to an inchoate mortgage and an inchoate sale. In the latter it is open to the party in possession of land who has bought without obtaining a registered deed of conveyance to sue for specific performance of a contract to sell. But there is no right to sue for specific performance possessed by a mortgagor who has given his land in mortgage without securing his right of redemption by a registered deed of mortgage. [8 B. L. R. 334 (F. B.) and 2 Rang. 285 (F.B.) Expl.] In such a case it is, however, open to the plaintiffs to bring a suit based solely on their title. If the defendant admits their title and if he fails to prove the contract to sell which he alleges, the plaintiff would be entitled to a decree. That decree must be made conditional on repaying the money advanced not with the intention of granting practically a decree for redemption but by ordering repayment on equitable grounds. The reason why different principles apply to the admissibility of evidence to prove a contract to mortgage and a contract to sell is that in the latter the defendant is entitled to claim specific performance and in the former case he is not. (*Robinson, C. J. Brown and Doyle, JJ.*) MAUNG SAN MIN *v.* MAUNG PO HLAING. **94 I.C. 567=4 Bur. L.J. 118= 4 Rang. 1=A.I.R. 1925 Rang. 291 (F.B.).**

———*Decree obtained—Principle ceases to apply.*

Where a suit for specific performance of the contract had already been brought and a decree obtained, *Held*, the matter did not thenceforth rest with the parties nor could any question of equities arise from the acts or conduct of the parties. After the decree the matter came into the hands of the Court and if

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the plaintiff did not take proper steps for executing the decree, he cannot rely upon the principle. (*Chatterjee and Cuming, JJ.*) PITAMBER GANI *v.* RAM CHARAN MORAL. **76 I.C. 365=28 C.W.N. 157= A.I.R. 1924 Cal. 483.**

—Suit for ejectment.

Vendee in possession under an agreement for sale and performing his obligations can defeat vendor's suit for ejectment though right to specifically enforce contract is barred by time. A. I. R. 1914 P.C. 27; A.I.R. 1926 P, C. 9; A.I.R. 1924 Mad. 271; 25 C.W,N. 905; 41 Bom. 438; A.I.R. 1922 Bom. 9; A.I.R. 1923 Bom. 473; A.I.R. 1924 Bom. 150; A.I.R. 1928 Bom. 150; 40 All. 187; A.I.R. 1924 All. 826; A.I.R. 1924 Rang. 214 (F.B.); A.I.R. 1923 Nag. 177; Nag. Second Appeal No. 473 of 1923, Rel. on.; 40 Mad. 1134; 17 C.P.L.R. 19; 5 N. L. R. 70; not Foll.; A.I.R. 1927 Nag. 353, Expl. A.I.R. 1922 Cal. 436, Ref. (*Subhedar and Jackson, A.J.Cs,*) INDRARAJ SINGH *v*, CHAITRAM. **117 I.C. 271= 25 N.L.R. 131=A.I.R. 1928 Nag. 194.**

———*Possession coupled with right to specific performance—Good defence—After-born sons of Hindu father.*

Part performance of contract by way of delivery of possession coupled with an enforceable right to specific performance is a good defence to an action for ejectment.

The defendant who is in possession of the property and has paid the price can successfully plead his possession and the contract for sale as a defence to a suit for possession by sons of the person agreeing to sell who claim under their father and who are born after the date of the contract to sell by their father, as they could not acquire at birth any interest in the property to which their father had already parted with his title. A. I. R. 1924 Mad. 271 (F.B.) Fol. (*Spencer, J.*) VENKIAH *v.* GURAVIAH. **96 I.C. 290= 23 M.L,W. 604=A.I.R. 1926 Mad. 757= 50 M.L.J. 669.**

———*Claim for specific performance barred.*

Even where a claim for specific performance of sale is time-barred or was so at the time of the suit, plaintiff transferor cannot eject defendant transferee. (*Duckworth, J.*) MA PYONE *v.* MA U. **77 I.C. 877= 2 Bur. L.J. 233=A.I.R. 1924 Rang. 89.**

—Suit for possession.

———*Agreement to sell to lessee in position—Consideration paid subsequent transferee from lessor—If can recover possession.*

The plaintiff's vendor agreed to sell certain property to the defendant who was already in possession as lessee. The defendant paid the full purchase-money but omitted to take a registered sale-deed. The plaintiff who was a subsequent transferee from the vendor sued to recover possession of the property from the defendant. *Held* dismissing the suit that the defendant was entitled to remain in possession of the property by virtue of the doctrine of part performance. It is not necessary for the application of that doctrine that delivery of possession should be effected at the time of the agreement. Thus the continuance of possession which is unequivocally referable to the contract is a sufficient act of part performance even though the taking of possession may be antecedent to the contract. (1896) 2 Ch. 428, (1918) 2 K.B. 315, 46 Bom. 722 and 52 Bom. 307, referred. (*Anantakrishna Aiyar, J.*) NAGANNA *v.* APPALARAJU.

1930 M.W.N. 320.

———*Possession under oral contract of Sale—Good defence.*

In a suit for possession of land it is a good defence

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that the person in possession has obtained possession under an oral agreement of sale, although no registered deed of sale has been executed and, therefore, no actual sale has taken place: A.I.R. 1924 Rang. 214 (F.B.), Rel. on. (*Rutledge, C.J. and Brown, J.*) MAUNG TUN PE *v.* MAUNG SEIN MYI. **120 I.C. 232= 7 Rang. 414=A.I.R. 1929 Rang. 293.**

———*Possession under oral contract of Sale—Purchase money paid—Claim to specific performance barred—Still good defence.*

To a suit by the owner to recover possession of immovable property of the value of Rs. 100 or upwards, it is a valid defence that the defendant had been put into possession under an oral contract of sale after paying the purchase money and such defence can be raised even though the right to sue for specific performance of the contract of sale may be barred by limitation: A. I. R. 1924 Rang. 214 (F. B.), applied. A.I.R. 1921 U.B. 10; A.I.R. 1924 Mad. 271 and A.I.R. 1923 Bom. 473, Rel on: A.I.R. 1927 Cal. 365, Dist. (*Rutledge, C.J. and Brown, J.*) MAUNG PO KYWE *v.* MAUNG PO TIN. **119 I.C. 744=7 Rang. 288= A.I.R. 1929 Rang. 251.**

———*Vendee under an unregistered deed—Consideration and possession passed—Subsequent purchaser under a registered deed—Right of.*

Where a purchaser of immovable property under an unregistered kobala has paid the agreed price to the vendor and is placed in possession, in the absence of circumstances showing that such purchaser was not entitled to sue his vendor for specific performance, a subsequent purchaser of the property under a registered conveyance cannot succeed in a suit to recover possession of the property from such purchaser: 18 C.W.N. 445 and 24 C.W.N..463, Ref.

To permit such a defence to be taken does not amount to an invasion or evasion of the Registration Act. (*Das and James, JJ.*) MT AKLI *v.* MT DAHO. **105 I.C. 63=7 Pat. 95=9 P.L.T. 308= A.I.R. 1928 Pat. 44.**

———*Possession under contract of sale.*

A defendant who is in possession of land under a contract of sale can resist a suit for possession by the owner: A.I.R. 1924 Rang. 214, Rel. on. (*Brown, J.*) PINDEE *v.* W.H. PA. **112 I.C. 230=6 Rang. 315= A.I.R. 1928 Rang. 237.**

———*Possession under a contract of sale—Sale invalid under S. 54, T.P. Act—Right to resist dispossession—Protection not right—Conferred.*

Persons in possession of immovable property under a contract for sale are entitled to resist a suit for possession, and they still have that right even if the original transaction purported to be an outright sale but was not a valid sale owing to the provisions of S. 54, T.P. Act. But it does not mean that a title can be conferred in total disregard of S. 54, T. P. Act or that a person who is not in possession of the property can bring a suit for possession based on an invalid title. (*Brown, J.*) MAUNG BA *v.* MAUNG KYWE.

110 I.C. 735=6 Rang. 125=A.I.R. 1928 Rang. 124.

———*Valid defence—Test.*

A person in possession of the property of another is entitled to retain that possession if he can show that he could successfully maintain a suit against that person for specific performance of a contract that would give him that title. (*Hallifax, A.J.C.,*) RAO SAHEB *v.* UMRAO. **102 I.C. 305=A.I.R. 1927 Nag. 353.**

———*Valid agreement for sale—When avails us good defence.*

Proof of a valid agreement for sale is a good defence to a suit for possession brought by the seller against the purchaser, in a case where possession has been

PART PERFORMANCE—Suit for possession.

transferred to the buyer but owing to failure to execute and register an instrument, there has been no legal conveyance of title from seller to purchaser, and where a suit for specific performance of the agreement for sale would not be barred by limitation. (*Robinson, C. J. Heald, May Oung, Lentaigne and Carr, JJ.*) MA MYAT THAZAN *v.* MA DUN. **81 I.C. 857 = 3 Bur. L.J. 78 = 2 Rang. 285 = A.I.R. 1924 Rang. 214. (F.B.)**

———*Vendee already in possession—Deed not executed but purchase money paid—Vendee can resist.*

Where a person agrees to sell his property to another who is already in possession and who has paid the purchase money but there is no registered deed of sale, the vendee can successfully resist a suit by the vendor to recover possession of the property, although the time has passed within which the vendee could have sued to get a sale-deed. A.I.R. 1922 Bom.9, Appl. (*Prideaux, A. J. C.*) SAMPAT *v.* MOTILAL. **71 I.C. 808 = A.I.R. 1923 Nag. 177.**

———*T. P. Act, S. 54—Vendee given possession but no sale-deed executed—Consideration paid—Vendor cannot sue for possession.*

The plaintiff, who sells an immoveable property to defendant, cannot claim possession from defendant-vendee who has paid the purchase-money and has been all along in possession, though no sale-deed has been executed. The equitable principles which should be applied to such facts are perfectly clear. (1916) 40 Bom. 498, 41 Bom. 438 (F.B.) Approved.

The defendant-vendee who is, and is entitled to remain, in possession though no sale-deed has been executed in due time, will not be able to sue the plaintiff for sale-deed; and so will have to remain in possession for 12 years before he can acquire a good title. (*Macleod, C. J. and Shah, J.*) VENKATESH DAMODAR MOKASHI *v.* MALLAPPA BHIMAPPA CHIKKALKI. **66 I.C. 868 = 46 Bom. 722 = 24 Bom. L.R. 242 = A.I.R. 1922 Bom. 9.**

———*Contract of sale—Defendant put in possession—Title not passed—Deft. can resist claim for possession.*

Where the defendant has been put into possession of the land under a contract of sale from the plaintiff, although no valid title may have passed and although limitation for a suit for specific performance by defendant may have expired, defendant can resist the plaintiff's claim for possession on the ground of the contract of sale. 29 Mad. 336 and 40 Mad. 1134, Dissented from. 10 L. B. R. 241; 40 All. 187; 41 Bom. 438 (F.B.); 18 C.W.N. 445; 23 C.W.N. 234 and 42 Cal. 801 (P. C.) Ref. (*Brown, J. C.*) MAUNG PO THA *v.* MAUNG BA DIN. **76 I. C. 141 = 4 U.B.R. 179 = A.I.R. 1921 U.B. 10.**

—Miscellaneous.

———*Suit for possession—Unregistered sale or mortgage—Possession given—Suit for possession or redemption—When can be resisted.*

A sale or mortgage invalid for want of registration must be looked upon as an agreement for sale or mortgage and if possession has been given in pursuance of the transaction the *quasi* vendee or mortgagee can resist a suit for possession or redemption by his vendor or mortgagor provided that specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined, (*Carr, J.*) MAUNG PO TOK *v.* ME YE WAR. **84 I.C. 468 = 3 Bur. L. J. 238 = A.I.R. 1925 Rang. 102.**

———*Small part of consideration fictitious—Vendee not to be penalised.*

PATENT—Anticipation.

A vendee should not be penalized merely because he enters as part consideration an item which may possibly be fictitious in whole or in part, where that item is only a fraction of the purchase money and where the sale would be unobjectionable if that item were left out of account, 8 P.R. 1908 Foll. 27 P.R. 1909, Expl. (*Chevis, J.*) GHULAM MAHAMMAD *v.* MUHAMMAD SHAH. **66 I.C. 898 = 3 L.L.J. 8 = A.I.R. 1921 Lah. 231.**

PARTY—Addition of.

See C. P. CODE, O. 1, R. 10.

PARTY WALL.

See also (1) CO-SHARER.
(2) EASEMENT,

—Acquiescence.

———*Raising party wall—Acquiesced in—Nature in law of the raised portion.*

If one of two neighbouring owners raises a party wall, the other owner giving his consent or acquiescing, then the raised portion must assume the same character as the old party wall on which it stands and therefore neither party can be allowed to commit a trespass on the party wall so increased, *e. g.*, by opening windows therein. (*Macleod, C.J. and Coyajee, J.*) IMAMBHAI KAMRUDDIN *v.* RAHIMBHAI USMANBHAI. **87 I.C. 977 = 49 Bom. 586 = 27 Bom. L.R. 503 = A.I.R. 1925 Bom. 373.**

—Custom.

The custom prevailing in a Brahmin village according to which the eastern wall of a house belongs to the owner of the site to the east of that house applies even where the eastern site is vacant. (*Devadoss, J.*) MEENAKSHI AMMAL *v.* KRISHNA SASTRIGAL **20 M.L.W. 952 = A.I.R. 1925 Mad. 344.**

———*Raised portion—Also a party wall—Liability for trespass.*

In a portion raised on an existing joint wall by one party with the acquiescence of the other neither owner is at liberty to open windows without the consent of the other, while the raised portion must also be considered to be a party wall. A. I. R. 1925 Bom. 373, Foll. 82 P.R. 1888, Dist. (*Addison, J.*) HIRALAL *v.* MILKHIRAM. **108 I.C. 389 = A.I.R. 1928 Lah. 598.**

———*Raising without consent—Remedies available.*

If one co-owner raises the party-wall without consent or acquiescence of the other co-owner, the latter can himself remove the raised portion of the wall without rendering himself liable to a claim for damages or may come to the Court and ask for an injunction in order to get the raised portion removed. (*Macleod C.J. and Coyajee, J.*) SHIVPUTRAPPA *v.* SHIVRUDRAPPA. **96 I.C. 432 = 28 Bom.L.R. 708 = A.I.R. 1926 Bom. 387.**

PASTURAGE.

See EASEMENT.

PATENT.

—Anticipation.

———*Law regarding anticipation laid down.*

Any information as to the alleged invention given by any prior publication must be for the purpose of practical utility, equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it, in order to sustain the defences of anticipation. Where the question is solely one of prior publication, it is not enough to prove that an apparatus described in an earlier specification could have been used to produce this or that result. It must also be shown that the specifications contained clear and unmistakable directions so to use it. It must be shown that the public have been so presented with the invention that it is

PATENT—Anticipation.

out of the power for any subsequent persons to claim the invention as his own. (*Lord Warrington of Clyffe.*) CANADIAN GENERAL ELECTRIC CO., LTD. *v.* FADA RADIO LTD. **31 M.L.W. 126 = A.I.R. 1930 P.C. 1. (P.C.)**

———*Date of knowledge.*

The date of the knowledge or use by any other person is a date before the invention not before the patent. (*Lord Warrington of Clyffe.*) CANADIAN GENERAL ELECTRIC CO. LTD. *v.* FADA RADIO LTD. **31 M.L.W. 126 = A.I.R. 1930 P.C. 1. (P.C.)**

———*What amounts to—Suggestions merely foreshadowing invention—If sufficient—Test.*

Test is would a man who was grappling with the problem solved by the patent attacked and having no knowledge of that patent if he had the alleged anticipation in his hand, have said, "that gives me what I wish"? *British Thompson Houston Co.* v. *Metropolitan Cickers Electrical Co*: 45 R. P. C. at p. 23, *Otto* v. *Linford*, (1882) 46 L. T. N. S. 35; *Flour Oxydysing Co.* v. *Car & Co.*, 25 R. P. C. at p. 457; and *Armstrong Whitworth & Co.* v. *Hard Castle*, 42 R. P. C. 543; Foll.

It cannot be too carefully kept in mind in patent law that in order to render a document a prior publication of an invention it must be shown that it publishes to the world the whole invention, *i.e.*, all that is material to instruct the public how to put the invention in practice. It is not enough that there should be suggestions which, taken with suggestions derived from other and independent documents, may be shown to foreshadow the invention or important steps in it. *British Ore Concentration Syndicate Ltd.* v. *Minerals Separation Ltd*: 26 R. P. C. 147, Foll. (*Viscount Dunedin.*) POPE ALLIANCE CORPORATION *v.* SPANISH RIVER PULP AND PAPER MILLS LTD. **116 I.C. 593 = A.I.R. 1929 P.C. 38. (P.C.)**

—Contract.

———*Right under contract—Different from right to make a contract.*

A right acquired does not mean a potential privilege enabling a contract to be made, but an actual right which was then enjoyed. If the contract has been made before the Commonwealth Statute came into force, the privilege of Section 6 would have been conferred; but the power to make such a contract is a different thing from the right which the contract confers and it is the latter and not the former, which in this connection this section safeguards. (*Lord Buckmaster.*) WESTRALIAN POWELL WOOD PROCESS LIM. *v.* REGAM. **A.I.R 1921 P.C. 228. (P.C.)**

—Infringement.

———*Mere device to hide.*

A mere useless appendage intended to serve as a screen to or a mere device to hide an actual infringement cannot protect the defendant in an action for damages for infringement of a patented invention. (*Wazir Hasan, A. J. C.*) SHEO RATAN SINGH *v.* RAJENDRA SINGH. **91 I.C. 140 = 2 O.W.N. 908 = A.I.R. 1925 Oudh. 652.**

—Inventions.

———*Prior and Subsequent—Construction of words or symbols—Parol evidence.*

The question whether a specification of a prior invention describes the invention claimed by the subsequent inventor is a question of construction and parol evidence is only admissible for the purpose of explaining words or symbols of art and other such like technical matters, and of informing the Court of relevant surrounding circumstances. (*Lord Warrington of Clyffee.*) CANADIAN GENERAL ELECTRIC

PATENT—Partnership.

CO. LTD. *v.* FADA RADIO LTD. **31 M.L.W. 126 = A.I.R. 1930 P.C. 1, (P.C.)**

———*Simplification—When amounts to.*

In almost every patent for mechanical combinations the elements are old. It must also be considered that there may be inventions in what, after all, is only simplification. After all, invention is finding out something which has not been found out by other people. The *quid* to the patentee is the monopoly; the *qua* is that it presents to the public the knowledge which they have not got. The real invention often may be and is just the last element of the combination. In every case arises a question of fact, whether the contrivance before in use was so similar to that which the patentee claims that there is no invention in the difference. The contrivance must be a contrivance in use, not one merely described but the application of well known things to an analogous use is not the proper subject for a patent. *Harwood* v. *Great Northern Ry. Co..*, 11 H.L.C. 654 and *Margan & Co.* v. *Win Dover & Co., the C. Spring case*, 7 R.P.C. 131, Foll. (*Viscount Dunedin*) POPE ALLIANCE CORPORATION *v.* SPANISH RIVER PULP AND PAPER MILLS LTD. **116 I.C. 593 = A.I.R. 1929 P.C. 38. (P.C.)**

—Novelty.

———*Subject-matter of invention—Law relating to—Alteration slight—Independent ingenuity and skill—More efficient result produced—Fit subject matter for patent.*

There must be a substantial exercise of the inventive power, or inventive genius, though it may in cases be very slight. Slight alterations or improvements may produce important results, and may disclose great ingenuity. Sometimes it is a combination that is the invention; if the invention requires independent thought, ingenuity and skill, producing in a distinctive form a more efficient result converting a comparatively defective apparatus into a useful and efficient one, rejecting what is bad and useless in former attempts and retaining what is useful, and uniting them all into an apparatus which taken as a whole, is novel, there is subject-matter of invention. A new combination of well-known devices and the application thereof to a new and useful purpose, may require invention to produce it, and may be good subject-matter for a patent.

Having regard to the conditions of the art of wireless telegraphy there is sufficient invention for claiming a patent even though the same consists only of a small step if it is a step forward. (*Lord Warrington of Clyffe.*) CANADIAN GENERAL ELECTRIC CO. LTD., *v.* FADA RADIO LTD. **31 M.L.W. 126 = A.I.R. 1930 P.C. 1. (P.C.)**

—Partnership.

———*Question of patent rights among partners—Court must decide in partnership suit—Duty of special Court.*

The Court, which is bound to determine and to determine finally and to dispose of questions arising in the partnership suits, cannot shirk its duty in deciding how the partners intended the patent rights to be dealt with, merely because special powers have been given to litigants to apply to another Court. The special Court under the Patent Act would be bound, in deciding any matter in relation to a patent in accordance with the sections of the Patent Act, to decide the controversy with reference to what had been established by the findings of the Court in the dissolution of the partnership which would be binding upon the parties, in any controversy under the Patent

PATENT—Tiles.

Act. (*Walsh, J.*) JWALA PRASAD *v.* RAGHUBIR PRASAD **70 I.C. 833=A.I.R. 1923 All. 17.**

—Tiles.

———*Proportions of mixture vaguely described—If claim established—Infringement.*

The proportions of the ingredients of a mixture for making tiles were only mentioned in the specification as "approximate" and "sufficient" and could only be treated as referred to in the claim by virtue of further indefinite words, *viz.* "substantially as described."

Held ; that the proportions were not claimed by the patentee ; but that upon the true construction of the patent, the patent (if valid) would be infringed by the manufacture of a tile composed of a mixture of the ingredient in any proportions. (*Lord Russell of Killowen.*) WANGANUI SASH & DOOR FACTORY & TIMBER CO. LTD., *v.* ROLAND MOORE MAUNDER. **A.I.R. 1930 P.C. 115. (P.C.)**

———*Made out of new substance—No inventive step taken—Patent invalid.*

Where invention claimed is of making a tile out of a new substance, *viz.* pumice sand, cement plus flax tow—and even assuming that neither flax tow nor any other fibre had before been used as a reinforcer of a concrete composed of cement and pumice sand, there is evidence to show that in employing it for that purpose the patentee took no inventive step, the patent is invalid. (*Lord Russell of Killowen.*) WANGANUI SASH & DOOR FACTORY & TIMBER CO. LTD. *v.* ROLAND MOORE MAUNDER. **A.I.R. 1930 P.C. 115. (P.C.)**

—Use of invention by Government.

———*Subject to statutory obligations—May contract that the use of patent shall take the form of licence.*

Although the Crown is at liberty to use the invention it is only at liberty to use it on condition which in the absence of an agreement, involves the settlements of the terms in the manner which the statute provides. There is nothing to compel them to exercise their right, and the Crown is at liberty, if it thinks fit, to accept the ordinary grant of a licence containing terms which may differ from those which might have been settled either by arbitration or the Court. This may only amount in the end to an agreement of the terms between the parties ; but that is not necessarily the case, since, if in effect an arrangement by way of licence does confer upon the Crown, rights of termination not otherwise enjoyed, the Crown are at liberty to contract that the use of the patent shall take the form of a licence. Where the parties have in fact contracted that the relationship between themselves shall be that of licensor and licensee, although it might have been possible that the same result could have been reached by other means, this does not prevent the arrangement being what in name it purports to be and consequently its being within the provisions of Section 87 (b), sub-Section 2. (*Lord Buckmaster*). WESTRALIAN POWELL WOOD PROCESS, LIM. *v.* REGEM. **A.I.R. 1921P.C. 228. (P.C.)**

PATENTS AND DESIGNS ACT (2 of 1911).

—S. 28—Invention.

———*Mere usefulness or mere simplicity—Does not amount to.*

In patent law the term " utility " is used, not in the abstract, but in a very special sense. Mere usefulness is not sufficient to support a patent. Patents for making in one piece , articles, previously made in two or more pieces, have generally been held invalid. So also mere simplicity in construction is not an invention. (*Gregory, J.*) INDIAN VACUUM BRAKE CO.

PATNA HIGH COURT RULES AND CIVIL CIRCULAR ORDERS—Publication.

LTD. *v.* E. S. LUARD. **92 I. C. 1008=53 Cal. 306=42 C.L.J. 543=A.I.R. 1926 Cal. 152.**

—S. 29—Invalid grant.

———*Want of novelty and prior user—Grant invalid—Each claim to be adjudicated independently of the other.*

In the preparation of ' Banslochan ' the respondent had been given patent in respect of the improvement discovered by him *viz.*, (1) the addition of sulphuric acid to the substance at a defined stage of the process *i.e.*, when red hot, (2) in the art of the process of heating in a stove constructed as described in the patent. In the action for infringement of the patent, it was not disputed, that prior to the date of the said patent ' banslochan' had been prepared for the market by a process which included, (a) washing the crude material in water, (*b*) treating it at some period of the process with sulphuric acid, and (*c*) calcining the mass which had been so treated in an iron stove or pan at a high temperature.

Held, that the claim in respect of improvement No. 1 was invalid for want of novelty, and prior user.

Held, further that in view of the above finding in respect of claim No. 1 it was unnecessary to examine claim No. 2.

Held, further that it was necessary to adjudicate in each claim independently and not to construe the above specification as it was one for a combination and not for subject-matters which were distinctively claimed. (*Lord Carson.*) GOPI LAL *v.* LAKHPAT RAI. **18 M.L.W. 141=28 C. W. N. 343=33 M. L. T. 279=4 L. R. P. C. 155=A. I. R. 1923 P. C. 103. (P.C.).**

—Ss. 43 & 53—Registration.

———*When affords protection design not new or original—Registration not effective.*

No registration is effective, unless the design or configuration, sought to be protected, is new and original and not of a pre-existing common type. Where the evidence clearly indicated that the designs in question were in use from long before the date, when the registration of the patent was applied for by the plaintiff,

Held : it was not possible therefore to say that those designs were new or original and that the plaintiff was entitled to the protection which he sought. 17 All. 490 Ref. (*Kanhaiya Lal and Sulaiman, JJ.*) RAM SAHAI *v.* ANGNOO. **77 I.C. 517=A.I.R. 1923 All. 496. (P.C.)**

PATNA HIGH COURT RULES AND CIVIL CIRCULAR ORDERS.

—Legality.

———*Rules not submitted to Rule Committee.*

The High Court Rules of Patna were framed under Cl. 29 of the Letters Patent. Although the rules were not submitted to any Rule Committee, they are quite legal. Ss. 122 and 123, C, P. Code, do not include the High Court at Patna as it was not established when the C. P. Code of 1908 was enacted. (*Dawson Miller, C. J. and Mullick, J.*) RAJENDRA KISHORE *v.* KAMAKHYA NARAIN SINGH, **60 I.C. 285=2 P.L.T. 112=1921 P.H.C.C. 97=A.I.R. 1921 Pat. 83.**

—Publication.

———*In High Court and not in Gazette—If sufficient.*

The Patna High Court has adopted the General Rules and Circular Orders of the Calcutta High Court and though these rules have not been published by the Patna High Court, the rule by which the Rules of the Calcutta High Court were extended was properly published and this is sufficient publication, as there

PATNA HIGH COURT RULES AND CIVIL CIRCULAR ORDERS—Special Bench.

was no necessity to publish the rules in their entirety. (*Coutts and Sultan Ahmad, JJ.*) RAM CHANDRIKA PRASAD SINGH *v.* RAM NIWAJI. **61 I.C. 666 = 2 P.L.T. 45 = A.I.R. 1921 Pat. 428.**

—Special Bench.

——*Question of constitution—Whole court to decide*

It is for the Court as a whole and not for the Chief Justice to decide whether a particular Full Bench decision should be considered by this Court in a Bench specially constituted for that purpose. *(Das and Macpherson, JJ.)* JAGADISWAR NARAYAN *v.* MD. HAZIQ HUSSAIN. **77 I.C. 851 = 5 P.L.T. 473 = 1924 P.H.C.C. 142 = A.I.R. 1924 Pat. 537.**

—R. 30—Construction.

Rule 30 must be construed as subject to Rr. 1 and 4. (*Das and Ross, JJ.*) TARKESHWAR PRASAD TEWARI *v.* DEVENDRA PRASAD TEWARI. **92 I.C. 184 = 3 P.L.R. 270 = 7 P.L.T. 267 = A.I.R. 1926 Pat. 180.**

—R. 35—Absence of translation.

——*Document cannot be referred to.*

An appellant who wishes to rely upon any documents is bound under the rules to have provided translations of them for the Court and in the absence thereof, the said documents cannot be referred to by the appellant in argument. (*Dawson Miller, C. J. and Coutts, J.*) KALI DAYAL *v.* UMESH PRASAD. **65 I.C. 266 = 1922 P.H.C.C. 33 = 1 Pat. 174 = 3 P.L.T. 506 = A.I.R. 1922 Pat. 63.**

—R. 37 (b)—Dismissal and withdrawal.

——*No distinction—Withdrawal after evidence taken—Not a dismissal for default.*

No distinction on principle can be drawn between the withdrawal of a suit and the dismissal of a suit for default, but it cannot be said that where a suit is withdrawn after witnesses had in fact been examined on behalf of the defendants that such withdrawal operates as a dismissal for default and defendant is entitled to full costs. (*Das and Adami, JJ.*) MOHANT RAM KISHUN DAS *v.* BENI PRASAD. **65 I.C. 355 = 3 P.L.T. 314 = A.I.R. 1923 Pat. 90.**

—R. 83—Grounds for report.

The accused were caught in the act of taking away thatching grass which another person had cut earlier. On that person remonstrating accused struck him with lathi. The Magistrate convicted each of them under S. 379 and some under S. 323. Sessions Judge recommended to the High Court to set aside conviction on the ground that no theft was established and further also under S. 323 as the injuries were trifling. Evidence of the Civil Surgeon showed that hurt was actually caused.

Held : that the Magistrate had not committed any error of law in either of his convictions so as to justify a report under R. 83, Part 1, General Rules and the Circular Orders of the High Court and, there was no reason for interfering with decision of the trial Court. (*James, J.*) KISHUN KUMAR SINGH *v.* EMPEROR. **117 I.C. 646 = 30 Cr.L.J. 842.**

—Vol. 1, Ch. XI, R. 45-E—Validity of Vakalatnama.

——*Signed, but date, party and certificate omitted—Irregular.*

The mere signing by the pleader of the *Vakalatnama* with the word 'received' without date, without any indication as to the party from whom he received or without any certificate that he was satisfied that the person from whom he received it was the party himself or a servant or relation or agent is irregular. (*Dawson Miller, C. J. and Mullick and Jwala Prasad, JJ.*) BANMALI DAS, *In re.* **71 I.C. 209 = 4 P.L.T. 235 = 1 Pat. R. Cr. 57 = 4 Cr.L.J. 81 = 1 Pat. 689 = A.I.R. 1922 Pat. 608 (F.B.)**

PATNA HIGH COURT RULES AND CIVIL CIRCULAR ORDERS, Ch. 6, R. 5—Appeal by beneficiary.

—Vol. 1, R. 9—Presentation of petitions.

——*Outside Court and Court hours.*

A presentation of a compromise petition to a judge at a railway station beyond Court hours and without an appointment previously consented to by the parties is not valid. (*Jwala Prasad and Bucknill, JJ.*) SRIMATI SAVITRI TAKHURANI *v.* F. A. SABAI. **105 I.C. 271 = 6 Pat. 108 = A.I.R. 1927 Pat. 354.**

—Ch. 1, R. 14—Identifier.

No identifier is certainly required now for a service of a notice upon a respondent in an appeal pending) in the High Court. (*Jwala Prasad and Ross, JJ.* NAGENDRA NATH GHOSH *v.* SAMBHU NATH PANDE. **65 I.C. 49 = 3 P.L.T. 438 = A.I.R. 1923 Pat. 114.**

—Ch. 2, R. 13 (2)—Stay in pending suit by Registrar.

The Registrar of the Patna High Court, has no jurisdiction to order stay of proceedings in a suit (as distinct from proceedings in execution) pending the disposal of an appeal. (*Das and Adami, JJ.*) NENA OJHA *v.* SARBHOO DUTT OJHA. **59 I.C. 883 = 2 P.L.T. 70 = A.I.R. 1921 Pat. 328.**

—Ch. 2, Rr. 16, 14, and 13—Receiving of memorandum.

——*By Deputy or Assistant Registrar—Validity.*

Whether the receiving of a memorandum of appeal is a judicial act or not, Rule 16 expressly says that it shall be only within the competence of a Judge or Judges of the High Court, in the absence of the Registrar, to receive a memorandum of appeal, and in the face of this express provision the Deputy or the Assistant Registrar could not receive the memorandum of appeal. (*Jwala Prasad, J.*) ANAND RAM PRAMBANS *v.* RAMGULAM SALVI. **71 I.C. 426 = 3 P.L.T. 820 = 1922 P.H.C.C. 365 = 1 P.L.R. 12 = 2 Pat. 264 = A.I.R. 1923 Pat. 150.**

—Ch. 3, Rr. 12 and 8—Source of belief.

——*Declarant must give details of.*

When in an affidavit on an interlocutory application the declarant makes a statement of his belief he shall, if the facts are ascertained from another person, give such details of such person as are required by R. 8. If the facts are ascertained from a document or copy of a document then he must state the source from which it was procured and shall state his belief as to the truth of such facts. (*Dawson Miller, C. J. and Macpherson, J.*) KESHUB PRASAD SINGH *v.* HARIHAR PRASAD SINGH. **90 I.C. 703 = A.I.R. 1926 Pat. 54.**

—Ch. 5, R. 3—Deficit in Court fee.

——*Not a question of law.*

The question when deficit in Court fee should be paid is one of convenience of procedure rather than a question of law within R. 3. (*Dawson Miller, C. J. Mullick and Bucknill, JJ.*) HITENDRA SINGH *v.* RAMESHWAR SINGH. **62 I.C. 43 = 2 P.L.T. 383 = 6 P.L.J. 293 = 1921 P.H.C.C. 161 = A.I.R. 1921 Pat. 88 (F.B.).**

—Ch. 6, R. 5—Appeal by beneficiary.

(*Obiter*)—R. 5. Ch. 6, contemplates cases where the beneficiary is not a party, but is affected by the decree. (*Kulwant Sahay and Macpherson, JJ.*) BRAJASUNDER DEB *v.* BHABAN SAHU. **103 I.C. 711 = 6 Pat. 373 = A. I. R. 1928 Pat. 177.**

——*English chancery practice, not applicable—Application lies only to establish claim as a beneficiary.*

An action was instituted by certain persons claiming to be interested in a certain wakf for the removal of the mutwalli and for the administration of the wakf estate. The appellant was not a party to the suit. He was a son of the mutwalli and claimed to have

PATNA HIGH COURT RULES AND CIVIL CIRCULAR ORDERS, Ch. 7, R. 2—Extension of time.

been elected mutwalli before the decree in the suit was passed. A question arose as to whether the appellant had a right of appeal.

Held, that recourse cannot be had to the practice that prevails in the Chancery Courts in England, when the High Court has itself framed a rule giving the right to certain classes of persons to appeal, though not parties to the action.

Held, further that he was not a person mentioned either in (*b*) or (*c*) of R. 5, Ch. 6 of the Patna High Court Rules. He did not come within (*d*), for his case was that he was elected mutwalli before (and not after) the date of the decree. He could not be called a beneficiary within the meaning of clause (*a*). Assuming that he was a beneficiary, he was not seeking to appeal as a beneficiary but as a mutwalli duly elected at a meeting of the Shia Mohammedans. Under clause (*a*) a beneficiary may appeal only to establish his claim as a beneficiary and not any other claim. Assuming that the practice that prevails in England, may be applied, the appellant in the present case could not by any possibility have been made a party to the action for, his claim had arisen since the institution of the suit and hence he could not be held to be ent tled to appeal. *Crawcour* v. *Salter* (30 W.R.) 329 and *In re, Markham* (16 Ch. D. 1.) Ref. (*Das and Adami, JJ.*) AHMAD NAWAB *v.* ABBAS HUSSAIN. **61 I.C. 76=6 P.L.J. 43=9 P.L.T. 624=A.I.R. 1921 Pat. 34.**

—Ch. 7, R. 2—Extension of time.

———*Vakalatnama filed after time.*

An appeal was presented without a vakalatnama. The vakalatnama was, however, filed subsequently on 8th November, the appeal having been presented on the last date of limitation, namely, on 28th October; but it appeared from the endorsement on the vakalatnama that it was executed on 28th October and that the stamp was also purchased on 28th October.

Held: that time should be extended to the 8th November and the appeal should be registered. (*Kulwant Sahay and Macpherson, JJ*). RAM KHELAWAN SINGH *v.* DIPLAL MAHTON. **107 I.C. 537=6 P.L.T. 608=A.I.R. 1928 Pat 240.**

—Ch. 7, R. 2—Limitation.

R. 2, Chap. 7 of the Patna High Court Rules, excludes the applicability of S. 12 of the Limitation Act to appeals under Cl. 10 of the Letters Patent. (*Dawson Miller, C.J. and Mullick. J*). DEOKI LAL *v.* RAMANAND LAL. **59 I.C. 179=2 P.L.T. 42=A.I.R. 1921 Pat. 365.**

—Ch.7, R. 4—Several appeals from one judgment.

———*Different appellants—Judgment copies to be filed with each memo.*

Where there are several appeals from one judgment by different appellants, the High Court will insist under the rules to have copies of judgment filed with each memo of appeals though where there are several appeals from the same judgment by the same appellant, he should be permitted to file one copy only of the judgment with the memorandum in one of his appeals. (*Dawson Miller, C.J, and Coutts, J.*) RIJAN THAKUR *v.* CHARITAR THAKUR. **69 I.C. 686=1 Pat. 670=4 P.L.T. 290=A.I.R. 1922 Pat. 580.**

—Ch. 7, R. 6—Limitation.

———*C. P. Code, Ss. 122 and 123—Second Appeal—Judgment copy not filed in time—If barred.*

R. 6 of Chap. 7 of the Rules of the Patna High Court is not a rule made under S. 122 of the C.P. Code. Hence R. 6, Chap. 7, does not, therefore, add anything to O. 41, R. 1, and a second appeal is not barred by limitation notwithstanding that a copy of the judgment of the trial Court is not filed in time. 40 All. 1 (F.B.) Dist. 32 Bom. 14, Foll. (*Jwala Prasad and Ross, JJ.*) RAMDEO SINGH *v.* MUKHAN SINGH. **74 I.C. 330=1923 P.H.C.C. 19=A.I.R. 1921 Pat. 509.**

—Ch. 17, R. 5-A—Criminal Case.

———*Entering appearance by an Advocate—Unnecessary.*

It has been the invariable practice in Patna High Court to allow advocates to appear and act for accused persons in criminal cases without any authority in writing. The new R. 5-A of Chapter 17 of the High Court Rules makes it obligatory for an advocate of the Patna High Court to file an appointment in writing in civil cases ; but it does not in any way interfere with the practice in criminal cases. (*Ross and Kulwant Sahay, JJ.*) SUBDU SANTAL *v.* EMPEROR. **94 I.C. 714=7 P.L.T. 524=1926 P.H.C.C. 125=27 Cr. L.J. 666=A.I.R. 1926 Pat. 296.**

PATNI REGULATION (Beng. Reg. 8 of 1819.)

—Nature of Patni.

Per *Chakravarti, J.*—The patni taluqs are really grants of the zemindar's interest without restrictions unless specially mentioned in the pattah. 1 Cal. 391 Ref. (*Walmsley and Chakravarti, JJ.*) SURENDRA NARAYAN SINHA *v.* RAJA BIJOYA SINGH DUDHURIA. **89 I.C. 785=52 Cal. 655=41 C.L.J. 527=30 C.W.N.233=A.I.R. 1925 Cal. 962.**

—Nature of proceedings.

———*Not against persons but against tenure.*

Where it was urged that the sale was bad, because the proceedings under the Regulation were carried on against the previous patnidar who was dead and whose name still stood on the books of the landlord,

Held, proceedings under the patni regulation, taken for the realization of arrears of patni rent, are not taken against persons at all, but against the tenure; and the zamindar is quite right in setting out in his petition and notice the name of the patni and the names of the patnidars as recorded in his books. The Regulation does not contemplate service of notice upon the defaulter personally. (*Mookerjee and Rankin, JJ.*) BEHARILAL BISWAS *v.* NASIMANNESSA BIBI. **73 I.C. 482=37 C.L.J. 222=A.I.R. 1923 Cal. 527.**

———*Not against patnidar but against tenure.*

The proceedings which are taken under the Putni Regulation by the zamindar for the recovery of his dues are proceedings taken, not personally against the putnidar but against the tenure which represents the security for the rent and therefore the fact that the notice of sale gives the name of a person whose title as putnidar ultimately failed, does not nullify the sale. (*Mookerjee, Ag.C.J. and Fletcher, J.*) BEJOY CHAND *v.* ASHUTOSH CHUCKERBUTTY. **62 I.C. 73=48 Cal. 454=25 C.W.N. 42=A.I.R. 1921 Cal. 494.**

—Patni over Patni.

———*Foreign to the scheme of the Regulation—No intermediate tenure is created.*

Apart from all authority, it would appear that the idea of a *putni* being created over another *putni* is absolutely foreign to the scheme of the Putni Regulation and any one familiar with the status of a *putnidar* would consider this position as anomalous. In the Putni Regulation, a *putnidar* has been given certain rights as against the zamindar. The *putnidar* is described as a taluqdar of the first degree and it is difficult to imagine that a tenure can be created over a taluqdar of the first degree. There can, however, be no objection to the assignment of the right of the

PATNI REGULATION, (1819)—Purchase by defaulter.

zamindar to receive rent from the *putnidar* which he is entitled to get under the *putni* settlement ; for example, he may create an *ijara* or he may execute a mortgage and make over possession to the mortgagee. In such cases, the assignee of the zamindar's interest would be entitled to recover rent from the *putnidar* by virtue of the assignment.

A creation of Putni ignoring the previous Putni creates no intermediate tenure between Putnidar and zamindar and creates no tenure superior to prior Putnidar. The Regulation does not contemplate the sale under its provisions, of the interest of one above a *putnidar*. (*Walmsley and B. B. Ghose, JJ.*) RAJENDRA NARAIN CHOUDHURI *v.* MOULVI ABU NASEER AHIYA. **71 I.C. 327=50 Cal. 146=27 C.W.N. 189=37 C.L.J. 141=A.I.R. 1923 Cal. 189.**

—Purchase by defaulter,

——Only voidable.

The purchase of a putni by one of the defaulters is, so long as the sale is not set aside, only voidable : 33 Cal. 666, Ref. (*Chatterjee and Cuming, JJ.*) NIRANKA CHANDRA *v.* ATUL KRISHNA GHOSE. **83 I.C. 110=41 C.L.J. 149=28 C.W.N. 1009=A.I.R. 1925 Cal. 67.**

—Reservations.

——Strictly to be construed.

Because the patni instrument does not authorise brick-making, it, by implication, does not forbid it and a reservation against digging tanks without permission is not to be construed as a reservation against the excavations involved in brick-making. (*Walmsley and Chakraverty, JJ.*) SURENDRA NARAYAN SINHA *v.* RAJA BIJOYA SINGH DUDHURIA. **89 I.C. 785=52 Cal. 655=41 C.L.J. 527=30 C.W.N. 233=A.I.R. 1925 Cal. 962.**

—Restrictions in lease.

——Covenants restricting excavation for tank excavations for brickmaking—Right of landlord to restrain.

A muffasil patni taluk lease according to the provisions of Regulation 8 of 1819 contained no reference to minerals or to the sub-soil, or to the right to excavate for making bricks. There was nothing in the lease to suggest that the land included therein was to be put to any use other than that to which the zamindari lands were subject at the time of the lease. On the other hand, the lease contained restrictive covenants relating tothe cutting of trees and the excavation of the land for the purpose of a tank without a sanad signed by the zamindar. The lessee excavated the land for brick-making. Landlord sued for an injunction and damages.

Held : that these covenants were inconsistent with a grant of the lands with an unlimited and unrestricted power to the grantee to use the lands in any way which he desired, including the excavation of clay for brick-making and causing thereby substantial damage to the land and that on using the land for brickmaking and causing substantlal damage by the lessees the landlord was entitled to the injunction and to damages A.I.R. 1925 Cal. 962 Reversed (*Sir Lancelot Sanderson*). RAJAH BEJOY SINGH *v.* SURENDERA NARAYAN- **111 I.C. 345=56 Cal. 1=55 I A. 320=48 C.L.J. 268=26 A.L.J. 1233=33 C.W.N. 7=28 M.L.W. 855=1928 M.W.N. 841=10 P.L.T. 66=A. I. R. 1928 P.C. 234=55 M.L.J. 456. (P.C)**

—Right creating sub-lease.

The mere mention of a right creating sub-lease in the patni lease does not vest the patnidar with a higher

PATNI REGULATION, (1819)—Zamindar and Patnidar.

right than is granted to him under the patni law. (*Suhrawardy and Duval, JJ.*) DURLAV CHANDRA *v.* JAMIRUDDIN AHAMAD. **90 I.C. 405=A.I.R. 1926 Cal. 314.**

—Rights of patnidar.

——Excavations for brick-making,

Per Chakravarti, J.—All the provisions of the Transfer of Property Act cannot be applied by analogy to the patni taluqs and patnidar is competent to use or lease out land for the manufacture of bricks and it is wholly consistent with a patnidar's right. (*Walmsley and Chakravarti, JJ.*) SURENDRA NARAYAN SINHA *v.* RAJA BIJOYA SINGH DUDHURIA. **89 I.C. 785=52 Cal. 655=41 C.L.J. 527=30 C.W.N. 233=A.I.R. 1925 Cal. 962.**

—Scope.

——Provisions not restrospective.

Terms of Regulation 8 of 1819 cannot be called in aid for the purpose of determining the incidents of a pre-regulation patni. (*Cuming and Mukerji, JJ.*) JOGENDRALAL *v.* MAHESH CHANDRA. **112 I.C. 172=55 Cal. 1013=47 C.L.J. 387=32 C.W.N. 559=A.I.R. 1929 Cal. 22.**

—Stipulation for altering rent.

——According to increase or diminution of area—Not repugnant to patni tenure.

The grant of a patni connotes the idea that the rent is fixed in perpetuity but there is no reason why a tenure should cease to be anything but a putni if there is a provision in the kabuliyat that the rent should be increased in a certain manner if the area of the mouza demised is found to be in excess of what was granted. That provision does not make the rent reserved variable. The result of that provision simply is that if there is a measurement, rent should be increased at a certain rate, and if that is donethe same rate will continue in perpetuity. Besides the enumeration of the elements of a patni in the preamble of Regulation 8 of 1819 does not exclude the idea of rent being altered either for increase of area or for diminution of area: A.I.R. 1925 P.C. 226: 13 B.L.R, 408, Rel. on. (*B.B. Ghose and Bose JJ.*) ARUN CHANDRA SINHA *v.* RAMIM BAKSH JAHAGIRDAR. **120 I.C. 706=56 Cal. 653=A.I.R. 1930 Cal. 81.**

—Unregistered transfer.

——Transferee may be ignored.

Until the registration of purchaser's name has been effected the transfer does not affect the zamindar's right, and in spite of the transfer, the landlord may ignore the transferee and may continue to hold the recorded tenant responsible for the rent and other obligations imposed upon the tenure : 15 Cal. 345, 20 W.R. 380, Rel. (*Panton and Mitter, JJ.*) KRISHNA CHANDRA *v.* DINANATH BISVAS. **107 I.C. 357=54 Cal. 1064=A.I.R. 1928 Cal. 94.**

—Use of Patni.

——Limits of.

If the use of patni does not threaten the complete destruction of the property, or if it does not threaten such a change as to endanger the rent, the zamindar has no cause for complaint. A.I.R. 1924 Cal. 56 Ref. (*Walmsley and Chakravarti, JJ.*) SURENDRA NARAYAN SINHA *v.* RAJA BIJOYA SINGH DUDHURIA. **89 I.C. 785=52 Cal. 655=41 C.L.J. 527=30 C.W.N. 233=A.I.R. 1925 Cal. 962.**

—Zamindar and Patnidar.

——Relationship.

The relation between a zamindar and patnidar is not similar to the relation between the English owner in fee simple and the lessee for a term of years,

PATNI REGULATION (1819), **S. 3—Abwabs.**

(*Walmsley and Chakravarti, JJ.*) SURENDRA NARAYAN SINHA *v.* RAJA BIJOYA SINGH DUDHURIA.
89 I.C. 785=52 Cal. 655=41 C.L.J. 527=30 C.W.N. 233=A.I.R. 1925 Cal. 962.

—S. 3—Abwabs.

———*Not enforceable.*

An agreement to deliver ghee and goat in a Maurasi Mokurrari Kabuliyat which can be called abwabs is not enforceable and the provisions of Act X of 1859 and VIII of 1869 of the Bengal Council govern S. 3 of Putni Regulation. 4 C.L. J. 527 distinguished. (17 Cal. 131, 16 I.A. 152 (P.C.). Referred to. (*Suhrawardy and Cuming, JJ.*) RAM TARAN TEWARY *v*, KUMEDA DASI.
68 I.C. 161=26 C.W.N. 634=A.I.R. 1922 Cal. 80.

—S. 3—Leases.

The Sub-Cl. (2) contemplates cases not only of complete transfer but includes also a lease which is a transfer or limited assignment within the meaning of sub-Cl. 2. (*Suhrawardy and Duval, JJ.*) DURLAV CHANDRA *v.* JAMRUDDEN AHMED. **90 I.C. 405=A.I.R. 1926 Cal. 314.**

—S. 3—Mokarari and Patni.

———*Distinction.*

Although there are various points of similarity between a mokarari and a patni, there are many points of difference. A patni, although in form a lease, is not a mere leasehold property. A patnidar may let lands in any manner that may be conducive to his interest. By the patni deed every right that the zamindar has passes to the patnidar, and unless there is some limitation expressly mentioned, the patnidar can without let and hindrance exercise those rights : 22 Marsh 28 ; 10 M.I.A. 16 ; A.I.R. 1917 P.C. 8 ; 12 W.R. 413 and A.I.R. 1925 Cal. 962, Foll. (*B. B. Ghose and G. N. Roy, JJ.*) RAJESWAR PRASAD *v.* BHUPENDRA NARAYAN. **106 I.C. 117=55 Cal. 35=45 C.L.J. 307=32 C.W.N. 16=A.I.R. 1927 Cal. 956.**

—S. 3—Rights of Patnidar.

Unless there is an express declaration to the contrary in a patni lease, the patni tenure is heritable and alienable, and the patnidar acquires all the interest of the zamindar in the subject-matter of the lease. But a patni tenure cannot create any right in the sub-soil unless it is expressly granted by the lease and the sub-soil is made the subject-matter of the grant. (Case-law discussed. 16 C.L.J. 7 held obsolete.) (*Jwala Prasad and Adami, JJ.*) RAMLAL KAVIRAJ *v.* SATYA NIRANJAN CHAKRAVARTHY. **1921 P. H.C.C. 49=A.I.R. 1921 Pat. 379.**

—S. 3—Sub-soil.

A patni tenure cannot create any right in the sub-soil unless it is expressly granted by the lease and the sub-soil is made the subject matter of the grant. (Case-law discussed, 16 C.L.J. 7 held obsolete). (*Jwala Prasad and Adami. JJ.*) RAMLAL KAVIRAJ *v.* SATYA NIRANJAN CHAKRAVARTHY. **1921 P.H.C.C. 49.=A.I.R. 1921 Pat. 379.**

—S. 5—Liability of Patnidar.

The liability of the patnidar for rent continues even after a transfer till the zamindar registers the transferee of the patnidar as a tenant and removes the name of the original patnidar : 20 W.R. 380 ; 13 M.I.A. 160 (P.C.) ; and (1846), S.D. 372 ; Foll. (*Suhrawardy and Garlick, JJ.*) TINKARI MUKHERJEE *v.* MAHIMA NIRANJAN. **114 I.C. 150=48 C.L.J. 392=33 C.W.N. 186=56 Cal. 524=A.I.R. 1929 Cal. 108.**

———*When ceases.*

The liability of the patnidar for rent does not cease by the deposit of the fee by the transferee and the tender of the necessary security as required by S. 5. He must be ready, if the zamindar refuses to register his transferee's name and accept the security, to follow it by the procedure laid down in S. 6 : (1864) W.R. 53, Foll.: 22 Cal. 494, Ref.; 19 Cal. 17 and 16 Cal. 642, Dist. (*Suhrawardy and Garlick, JJ.*) TINKARI MUKHERJEE *v.* MAHIMA NIRANJAN.
114 I.C. 150=48 C.L.J. 392=33 C.W.N. 186=56 Cal. 524=A.I.R. 1929 Cal. 108.

PATNI REGULATION 1819), **S.—8—Diminution in area.**

—S. 5—Unregistered transferee.

———*Acquires no right—Transferor liable even after transfer—Sale for arrears of rent cannot be impugned.*

The transfer of a patni tenure is subject to the payment of fees and security to the landlord as required by S. 5, and until these conditions are tulfilled, the landlord has a right to refuse to register and otherwise to give effect to such alienations by discharging the party transferring his interest from personal responsibility and by accepting engagements of the transferee. Until the registration of transferor's name has taken place, the transfer does not affect the zamindar's right and it does not create any relationship of landlord and tenant. In spite of the transfer the landlord may ignore the transferee and may continue to hold the recorded tenant responsible for the rents and other obligations imposed upon the tenure ; and if the tenure is sold by the landlord for the arrears of rent due therefor in a proceeding against the recorded tenant, the purchaser acquires the tenure free from any incumbrance created upon it by act of the defaulting proprietor, his representatives or assignees, the zamindar having an indefeasible right to hold the tenure answerable for the rent which is his reserved property in the tenure. The whole tenure at such a sale passes, and not only the right, title and interest of the recorded tenant, so that the interest of an unrecorded transferee ceases and he has no right to impugn the sale upon the ground that he was not made a party to the proceedings taken by the landlord in selling up the tenure for the realization of his rent. (*Jwala Prasad and Bucknill, JJ.*) ABDUL GAFFAR *v.* F.B. DOWNING. **98 I.C. 893=8 P.L.T. 343=5 Pat. 415=A.I.R. 1926 Pat. 465.**

———*Right to set aside sale.*

An unregistered assignee, though he cannot claim to be a tenant of the landlord and to release his assignor, yet has an interest independently of the regulation and can impugn a sale held under the Patni Regulations as being no sale at all and as being void against everybody else. He can have the sale set aside on the ground of its being illegal or irregular, or tained with fraud. And if he succeeds in getting the sale set aside on the above grounds, he will be restored to the position which he had before the sale. But he has no right to have the sale set aside upon the ground that he was not a party to the proceedings taken by the landlord to realize his rent by sale of the holding : 26 Cal. 677 ; 17 Cal. 162 ; 32 Cal. 1031; 20 W.R. 380 ; 20 Cal. 247 ; 19 Cal. 703 ; 3 C.W.N. 38 ; 29 C.L.J. 48 ; A. I. R. 1923 Cal. 527 and 9 C. W. N. 224, Rel. on. (*Jwala Prasad and Bucknill, JJ.*) ABDUL GAFFAR *v.* F.B. DOWNING. **98 I.C. 893=8 P.L.T. 343=5 Pat. 415=A.I.R. 1926 Pat. 465.**

—S. 8—Diminution in area.

———*Summary levy of rent—Exemption.*

The fact that since its creation a patni has diminished in area, from whatever cause, would not exempt the patni from the provisions of the Patni Regulation as to the summary levying of the rental. (*Mookerjee, Ag. C. J. and Fletcher, J.*) SHARAJINI DASI *v.* KAZI ABDUL. **60 I.C. 452 (Cal.)**

PATNI REGULATION, (1819), S. 8—Notice—Contents and service of.

—S. 8—Notice—Contents and service of.

Strict conformity with the requirements of the regulation in respect of contents and service of notice mentioned in Ss. 8 and 10 is essential to secure a valid sale. (*Lord Shaw.*) BHUPENDRA NARAIN *v.* MADAR BUKSH. **92 I.C. 681=53 Cal. 1=52 I.A. 439=23 M.L.W. 9=A.I.R. 1925 P.C. 297. (P.C.)**

—S. 8—Notice—Contents of.

———*Zemindar's liability to comply with requirements.*

Section 10 contemplates a self-contained notice, which comprises not only a specification of the arrears and notification that the sale will be held on the 1st Jaistha if the amount claimed be not paid before that date, but also a statement of the lots proposed to be sold in the order in which the sale will be held. 47 Cal. 337 Appr.

The zemindar is exclusively answerable for the observance of the forms prescribed in Section 8, Clause 2. Strict conformity with the requirements of the Regulation in respect of the contents and service of the notice mentioned in Sections 8 and 10 is essential to secure a valid sale. Case law referred. (*Mookerjee and Panton, JJ.*) BHUPENDRA NARAIN SINGH *v.* MADAR BUX. **66 I.C. 793=34 C.L.J. 399=A.I.R. 1921 Cal. 296.**

—S. 8—Notice—Validity of.

As regards validity of notice S. 8 is to be read with S. 10: 20 Cal. 86. (P. C.), Dist. (*Graham and Mitter, JJ.*) KHYARENNESSA CHOUDARHANI *v.* SATYA BHANU GHOSAL. **A.I.R. 1930 Cal. 599.**

—S. 8—Publication of petition not necessary.

Publication of the original petition filed by the zamindar is not a substantial portion of the process to be observed by the zamindar and its non-publication does not affect the validity of the sale: 14 Cal. 365 (P. C.) and 20 Cal. 86 (P. C,), Rel. on. (*B. B. Ghose and Bose, JJ.*) ARUN CHANDRA SINHA *v.* RAHIM BAKSH JAHAGIRDAR. **120 I.C. 706=56 Cal. 653=A.I.R. 1930 Cal. 81.**

—S. 8—Special procedure.

———*Applies only where zamindar expressly reserves right to sell,*

By the first paragraph of S. 8, it is provided that zamindars shall be entitled to apply for periodical sales of any tenures upon which the right of selling for an arrear of rent have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure. Paragraphs 2 and 3, S. 8 lay down the procedure which should govern such a sale. This special procedure can only be taken advantage of by the zamindar where he reserves an express right to him of selling the tenure for an arrear of rent. Where there is no special reservation of that right the procedure as laid down in the regulation cannot be followed by the zamindar: 7 W. R. 260, Foll. (*Das and Allanson, JJ.*) MANGOBINDA SAHU *v.* SATYA NIRANJAN. **112 I.C. 659=9 P.L.T. 593=8 Pat. 190=A.I.R. 1928 Pat. 482.**

—S. 11—Application of Tenancy Act.

———*Applies where Patni law is silent—Right under general law not taken away—Additional summary remedy given.*

Section 195 (e) of the Bengal Tenancy Act says that the Bengal Tenancy Act would not apply to enactments relating to patni tenures in so far as it relates to those tenures. Where the patni law is silent, the provisions of the general rent law would apply. The Patni Regulation does not take away the right of the zamindar to proceed in the ordinary way under the general law to recover arrears of rent; it only gives

PATNI REGULATION, (1819), S. 11—Power of transfer.

him an additional right to recover rent by a summary process of sale which is restricted to the recovery of rent for only one year: 22 C. W. N. 131 and 19 Cal. 504, Foll. (*Jwala Prasad and Bucknill, JJ.*) SHAIKH ABDUL GAFFAR *v.* F. B. DOWNING. **98 I.C. 893=5 Pat. 415=8. P.L.T. 343=A.I.R. 1926 Pat. 465.**

—S. 11—Khudkasht raiyat.

———*Protection from ejection.*

Under Section 11 a person who is a *Khudkasht raiyat* is protected from ejection from the holding including the part he uses for residential purposes as well as the waste land and the land he cultivates. (*Newbould, J.*) E. KRISHNA PRAMADA DASI *v.* RASH BEHARI DAS. **67 I.C. 709=A.I.R. 1923 Cal. 327.**

—S. 11—Occupancy raiyat.

———*Other than Khudkasht raiyat—Protection from ejection.*

Clause 3, S. 11 only provides certain restrictions on the right of an auction-purchaser to eject certain persons, which right has been given by the previous clauses of that section. If the right of the person in occupation does not come within the first or the second clause of that section, and if the occupier of the land is protected from ejectment by some other law, there is no reason to suppose that S. 11 of the Regulation gives authority to the auction-purchaser to eject that occupier of the land by virtue of his purchase: 3 C. W. N. 13 Doubted.

The proviso in the third clause does not mean that persons in occupation not coming within the definition of khudkasht raiyats, are liable to be ejected, even if they have acquired occupancy rights under the tenancy law. (*B. B. Ghose and Roy, JJ.*) RASH BEHARI MANDAL *v.* HEMANTA KUMAR GHOSE. **106 I.C. 71=54 Cal. 788=A.I.R. 1928 Cal. 52.**

—S. 11—Occupancy tenant.

———*Protection from eviction—Policy of the law.*

The policy of the law at the time of the enactment of the patni regulations seem to have been to protect from eviction those cultivating the land; at the time of the enactment of the patni regulations, occupancy rights did not exist, those cultivating the lands were either khudkhast ryots, that is ryots of the village cultivating the lands, or paikast ryots who were cultivators who came from outside the village. Consequently, S. 11 of the Patni Regulations extends protection to the only cultivating ryots of the village then known namely khudkhast ryots or resident and hereditary cultivators. It has been the policy of the law throughout to protect those actually on the land and cultivating it. Therefore, these occupancy tenants also must be deemed to be protected. (*Greaves and Chakravarty, JJ.*) JNANENDRA MOHAN BHADURI *v.* HARENDRA KRISHNA DE. **87 I.C. 32=A.I.R. 1925 Cal. 1169.**

—S. 11—Power of transfer.

———*Provision relating to the contingency of a transfer—Cannot be construed as giving power.*

Where the pattah by which the Chowkidari Chakran lands were granted provided " if the land be transferred by gift, sale or succession, the costs whatever may be incurred by the Raj estate for making an enquiry as to who is the person in possession for the time or whatever loss may be suffered by the Raj estate on account of the name of the present occupier not being registered shall be paid by the present occupier without objection."

Held: that these provisions cannot be construed as giving an express authority to make a transfer as contemplated by the provisions of the second paragraph of Cl. (1) of S. 11 of the Registration Act, VIII

PATNI REGULATION, (1819), S. 11—Realization of rent.

of 1819 and therefore a purchaser of the Putni Taluq at the regulation sale was entitled to the chowkidari lands. (*Walmsley and B. B. Ghose, JJ.*) SRIMATI KANCHAN BARANI DEBI *v.* UMESH CHANDRA ROY. **87 I.C. 529=41 C.L.J. 295= A.I.R. 1925 Cal. 807.**

—S. 11—Realization of rent.

———*Summary procedure does not exclude procedure under the general law.*

Even if a landlord allows his rent to fall into arrear for a period exceeding one year, he is not debarred from realizing it under ordinary law. The Patni Regulation gives to the zamindar the right to realize the rent by a summary procedure and that summary procedure is restricted only to periodical rents. But the zamindar is not bound to realize his rent every six months. He can wait for a longer period, and if he does wait for a longer period he can proceed under the general law for the realization of his rent. (*Jwala Prasad and Bucknill, JJ.*) ABDUL GAFFAR *v.* F. B. DOWNING. **98 I.C. 893=5 Pat. 415=8 P.L.T. 343= A.I.R. 1926 Pat. 465.**

—S. 11—Rights of landlord.

———*Not limited to receiving rent only.*

In saying that the rent is reserved property of the landlord in the tenure, the framers of the regulation mean no more than the rent is the first charge on the tenure, so that the holder of the tenure cannot enter into any transaction so as to bar the indefeasible right of the zamindar to hold the tenures of his creation answerable for the rent in the state in which he created it. But it does not follow that he has no interest in such tenure other than receiving rent in respect thereof: 7 Cal. 585 and 24 Cal. 440, Ref. (*Das and Allanson, JJ.*) MANGOBINDA SAHU *v.* SATYA NIRANJAN. **112 I.C. 659=9 P.L.T. 593=8 Pat. 190= A.I.R. 1928 Pat. 482.**

—S. 11—Right of transfer.

———*Not mere incumbrances—Must be specifically given in the lease.*

The terms of S. 11, Cl. 1, are not satisfied unless at least the right of transfer is expressly stated in the lease or other engagement to be a right to make transfers which shall not be mere "incumbrances."

The meaning of second para of the clause is that no transfer is to bar the indefeasible right of the Zemindar unless it is made with the condition that it shall not amount merely to an incumbrance and such condition can only be annexed where express authority for that purpose has been received from the Zemindar or superior landlord. (*Richardson and Suhrawardy, JJ.*) GOPAL CHANDRA PODDAR *v.* DWARIKA NATH DUTTA. **69 I.C. 655=A.I.R. 1924 Cal. 353.**

—S. 11—Sub-lease.

———*Right to create must be specifically conferred in the lease.*

The sub-clause requires that in order that the zamindar should be bound by the sub-lease created by the patnidar and to defeat the zemindar's right to hold the tenure of his creation answerable in the state in which he created it for his rent, the patni lease must confer on the patnidar the right to create such an under-tenure as will bar the above indefeasible right of the zamindar. (*Suhrawardy and Duval, JJ.*) DURLAV CHANDRA *v.* JAMIRUDDIN AHAMAD. **90 I.C. 405=A.I.R. 1926 Cal. 314.**

—S. 13—Girbidar.

———*Patnidar not entitled to disturb.*

The position of the girbidars is the same as that of a usufructuary mortgagee in possession; and the patnidar is not entitled to disturb his possession by granting a lease to other persons and lease so granted is not in any way binding on the girbidars: 11 W. R. 357, Foll.: 12 Cal. 185; 15 C.W.N. 404; and 7 C.L.J. 60; Ref. (*Cuming and Mukerji, JJ.*) TATA IRON STEEL & CO. *v.* RADHA MONI DASI **110 I.C. 644= A.I.R. 1928 Cal. 826.**

PATNI REGULATION, (1819)—S. 14—Refund of purchase money.

—S. 14—Irregular sale.

———*How avoided—Second sale during pendency of setting aside proceedings—Effect.*

An irregular sale is only voidable capable of being avoided by a suit under S. 14. If a second sale is held during the pendency of proceedings to set aside the first, the second becomes a part of the first and would stand or fall with it. (*Richardson and Shamsul Huda, JJ.*) MAHARAJADHIRAJA OF BURDWAN *v.* MRITUNJOY GHOSE. **60 I.C. 182=45 Cal. 782= 24 C.W.N. 785.**

—S. 14—Notice—Service of.

———*How effected—Manner of publishing the notice of sale—Irregular sale—Second sale during the pendency of proceedings to set aside the first.*

The notice of sale need not be served personally. It is sufficient if it is posted on the office of the defaulter. (*Richardson and Shamsul Huda, JJ.*) MAHARAJADHIRAJ OF BURDWAN *v.* MRITUNJOY GHOSE. **60 I.C. 182=47 Cal. 782=24 C.W.N. 785.**

—S. 14—Purchaser's remedy.

———*Separate suit barred.*

The purchaser must have recourse to the remedy provided by Section 14 to the extent that it is available and he cannot maintain a separate suit to obtain the relief which if he had so desired might have been granted to him against the zamindar in the suit for reversal of the sale. 46 Cal. 670; 1 C.L.R. 236; 20 Cal. 746; 24 C.W.N. 617; 48 Cal. 454 Foll. 5 C.L.J. 59, Expl. and Dist. (*Mookerjee and Rankin, JJ.*) CHOWDHURY MOHAMAD AMIN *v.* BIJOY CHAND MAHATAB. **75 I.C. 20=50 Cal. 756=38 C.L.J. 192= A.I.R, 1923 Cal. 732.**

—S. 14—Refund of purchase-money.

———*Sale of patni in a rent decree—Surplus withdrawn by a creditor of one patnidar—Sale subsequently set aside—Zamindar made to pay whole purchase-money—Suit lies by zamindar against the creditor.*

Certain patni was sold for arrears of rent under patni regulation on 17th December 1919 and was purchased by a third party. The zamindars took out their dues from the purchase-money and the balance remained in deposit. A decree-holder against one of the patnidars attached the surplus sale proceeds on 4th June 1920 and realized his dues in full under that attachment on 25th September 1920. Some of the darpatnidars, however, on 17th September 1920, brought a suit to have the patni sale set aside. The suit was decreed and the zamindars had to refund to the auction-purchaser the amount which the auction-purchaser had paid for the patni at the patni auction. Thereafter, a suit was brought by the zamindars against the decree-holder to recover with interest Rs. 161 which he had withdrawn by attachment under the money decree.

Held: that the decree-holder took the risk of withdrawing the money when the period of limitation for bringing a suit to set aside the sale had not yet expired. He acted at his own risk and was therefore liable to refund the amount: 38 C.L.J. 137, Rel. on. (*Duval, J.*) SHIBA KUMARI DEBI *v.* DUKSHA BALU DASSI **110 I.C. 49=41 C.L.J. 369= A.I.R. 1928 Cal. 296.**

PATNI REGULATION, S. 14—Refund of purchase money.

——*Patni Sale—Part of purchase-money withdrawn by a holder of decree against patnidar's judgment creditor—Sale subsequently set aside—Purchaser can sue for refund of money withdrawn.*

A person had a decree against the judgment-creditor of a *Patnidar* and withdrew, in execution of his decree, a part of the purchase money deposited in the Collectorate by the purchaser of the *patni* at a sale, held under Section 14, *Patni Taluks* Regulation. When the *patni* sale had been set aside by a compromise decree in a suit brought by the *Patnidar* against the *Zamindar* and the purchaser;

Held: the purchaser had a right to maintain a suit against the person who had withdrawn the portion of the purchase-money, for recovery of amount withdrawn. 3 Ch. 483; 21 W.R. 252 referred to. (*Jwala Prasad, A. C. J. and Ross, J.*) MAHARAJ BAHADUR SINGH *v.* SHAIKH ABDUL RAHIM.

62 I.C. 900=1 Pat. 5=3 Pat. L. T. 37=A.I.R. 1922 Pat. 394.

—S. 14—Right to set aside sale.

——*Limited to person mentioned in the Section.*

A sale under the Regulation can only be questioned by a person entitled to do so under S. 14 of the Regulation and the title of the purchaser under the Regulation sale cannot be questioned collaterally. But the sale must be held with jurisdiction. It seems that the whole scheme of the Putni Regulation is that the *putnidar* is the only person whose interest can be sold under the Regulation and not the interest of a person who is created a *putnidar* ignoring the previously created *putnidar*. (*Walmsley and B. B. Ghose, JJ.*) RAJENDRA NARAIN CHOUDHURI *v.* MOULVI ABU NASEEER AHIYA. **71 I.C. 327=50 Cal. 146=27 C.W.N. 189=37 C.L.J. 141=A.I.R. 1923 Cal. 189.**

—S. 14—Setting aside sale.

A sale held under the regulation can only be set aside by a suit as provided under S. 14, Regn. 1819 and it cannot be challenged by proceedings of a different character. (*B. B. Ghose and Mullick, JJ.*) NALINAKHA *v.* RAM RATAN. **104 I.C. 151=46 C.L.J. 51=A.I.R. 1927 Cal. 733.**

PENAL CODE, (1860).

——*Suit against one deriving title under purchaser and previous putnidars—Regulation does not apply.*

Where a suit was brought not only against the zamindar and the purchaser but also against one who had derived his title from the purchaser, as well as the previous owners of the patni.

Held: that the suit was not one for setting aside the sale under the patni regulation. (*B. B. Ghose and Mullick, JJ.*) NALINAKHA SINHA *v.* RAM TARAN. **104 I.C. 151=46 C.L.J. 51=A.I.R. 1927 Cal. 733.**

—S. 14—Two Sales.

——*Sale under Public Demands Recovery Act—Not confirmed—Sale under Regulation not bad.*

If on the date of sale of Patni taluq under S. 14 of the Regulation (8 of 1819) there is another order existing for the sale of the same property under Public Demands Recovery Act, unless this latter sale is confirmed thereby vesting the title in the purchaser, under S. 20 of the Public Demands Recovery Act, the sale under S. 14 of the Regulation is not bad, and passes good title to the purchaser: A. I. R. 1918 P. C. 159, and 15 Cal. 546 Ref. 12 Cal. 597, Dist. (*Graham and Mitter, JJ.*) KHYARENNESSA CHOUDHURANI *v.* SATYA BHANU GHOSAL. **A. I. R. 1930 Cal. 599.**

PATTA AND PATTADAR.

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(2) RYOTWARI.

PATWARI PAPERS.

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